v. MATHEWS

82-1050

No.

Office-Supreme Court, U.S. FILED

ALEXANDER L. STEVAS.

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

W.

ROBERT H. MATHEWS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

REX E. LEE Solicitor-General

J. PAUL McGrath
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

RICHARD G. WILKINS
Assistant to the Solicitor General

ROBERT S. GREENSPAN FRANK A. ROSENFELD Attorneys

Department of Justice Washington, D.C. 20530 (202) 633-2217

QUESTIONS PRESENTED

- 1. Whether a statutory exception to a general provision in the Social Security Act that was intended to protect the reliance interests of certain individuals violates the equal protection component of the Due Process Clause of the Fifth Amendment because it incorporates a gender-based classification previously held unconstitutional in a different context.
- Whether a severability clause which provides that
 if any part of a statutory exception is found invalid the
 exception shall not be applied to any other person or
 circumstance is an unconstitutional usurpation of judicial power by the legislature.

PARTIES TO THE PROCEEDING

Appellees represent a nationwide class composed of "all applicants for husbands' insurance benefits * * * whose applications * * * have been denied [on or after October 12, 1979] solely because of the statutory requirement that husbands must have received more than one-half of their support from their wives in order to be entitled to benefits" (App. B, infra, 10a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions in-	
volved	1
Statement	2
The question is substantial	9
Conclusion	22
Appendix A	1a
Appendix B	10a
Appendix C	12a
Appendix D	13a
Appendix E	15a
Appendix F	23a
Appendix G	27a
Appendix H	29a
Appendix I	30a
TABLE OF AUTHORITIES	
Cases:	
Buckley v. Valeo, 424 U.S. 1	21
Califano v. Goldfarb, 430 U.S. 199 2, 1	
	15, 17
Califano v. Silbowitz, 430 U.S. 924	2, 14
Califano v. Webster, 430 U.S. 313	16
Califano v. Westcott, 433 U.S. 76	18, 20
Caloger v. Harris, No. H-80-388 (D. Md. Mar. 25, 1981)	13
Champlin Refining Co. v. Corporation Commission, 286 U.S. 210	21
Chevron Oil Co. v. Huson, 404 U.S. 97	14
City of New Orleans v. Dukes, 427 U.S.	133
297	17

Cases—Continued:	Page
Craig v. Boren, 429 U.S. 190 7, 14	4, 18
Dorchy v. State of Kansas, 264 U.S. 286	19
Duffy v. Harris, No. 79-386 (D.N.M. Oct. 23, 1979)	13
Hudgins v. Harris, No. M-79-1939 (D. Md.	
Apr. 12, 1980)	13
Jablon v. Califano, 430 U.S. 924	2, 14
Kahn v. Shevin, 416 U.S. 351	16
Michael M. v. Superior Court, 450 U.S.	
464	16
Miller v. Department of Health and Hu-	
man Services, 517 F. Supp. 1192	13
Orr v. Orr, 440 U.S. 268 18, 19	9, 20
Rosofsky v. Schweiker, 523 F. Supp. 1180, prob. juris. noted, No. 81-1551 (May 2, 1982), appeal dismissed (June 22,	
1982)	3, 19
Rostker v. Goldberg, 453 U.S. 57	16
Schlesinger v. Ballard, 419 U.S. 498	16
Stanton v. Stanton:	
421 U.S. 7	18
429 U.S. 501	18
United States Railroad Retirement	
Board v. Fritz, 449 U.S. 166 1'	7, 18
Wachtell v. Schweiker, No. 80-8022-	
Civ. ALH (S.D. Fla. Jan. 26, 1982)	13
Webb v. Harris, 509 F. Supp. 1091	13
Constitution and statutes:	*
United States Constitution, Fifth Amend-	
ment (Due Process Clause) 2, 13, 18, 19	, 30a
Railroad Retirement Act of 1974, 45 U.S.C.	
(& Supp. IV) 231	17

Constitution and statutes—Continued:	Page
Social Security Act, 42 U.S.C. (& Supp. IV)	
301 et seg:	
Section 202(b), 42 U.S.C. 402(b)	2
Section 202(b), 42 U.S.C. (& Supp. IV)	
402(b)	2
Section 202(c), 42 U.S.C. 402(c)	31a
Section 202(c), 42 U.S.C. (& Supp. IV)	
402(c)	2
Section 202(c)(1), 42 U.S.C. 402(c)(1)	31a
Section 202(c)(1)(A), 42 U.S.C.	3000
402(c)(1)(A)	31a
Section 202(c)(1)(B), 42 U.S.C.	
402(c)(1)(B)	31a
Section 202(c)(1)(C), 42 U.S.C.	
402(c)(1)(C)	31a
Section 202(c)(1)(C)(i), 42 U.S.C.	
402(c)(1)(C)(i)	31a
Section 202(c)(1)(C)(ii), 42 U.S.C.	
402(c)(1)(C)(ii)	31a
Section 202(c)(1)(D), 42 U.S.C.	
402(c)(1)(D)	31a
Section 202(f), 42 U.S.C. 402(f)	2
Section 202(j)(2), 42 U.S.C. (Supp. IV)	
402(j)(2)	33a
Section 202(k)(3)(A), 42 U.S.C.	
402(k)(3)(A)	. 3
Section 204(b), 42 U.S.C. 404(b)	33a
Social Security Amendments of 1977, Pub.	
L. No. 95-216, 91 Stat. 1509, 42 U.S.C.	
(Supp. IV) 301 et seq	2
Section 202(c), 42 U.S.C. (Supp. IV)	
402(c)	30a
Section 202(c)(1), 42 U.S.C. (Supp. IV)	13
402 (c)(1)	30a
Section 202(c)(1)(A), 42 U.S.C. (Supp.	
IV) 402(c)(1)(A)	30a

Constitution and statutes—Continued:	Page
Section 202(c)(1)(B), 42 U.S.C. (Supp.	
IV) 402(e)(1)(B)	30a
Section 202(c)(1)(C), 42 U.S.C. (Supp.	
IV) 402(c)(1)(C)	30a
Section 202(c)(2)(A), 42 U.S.C. (Supp.	00
IV) 402(c)(2)(A)	30a
Section 205(g), 42 U.S.C. (Supp. IV) 405(g)	6
Section 334(a)(2), 42 U.S.C. (Supp. IV)	
402(b)(4)(A)	4, 5
Section 334(b), 42 U.S.C. (Supp. IV) 402(c)	2
Section 334(b)(1), 42 U.S.C. (Supp. IV)	-
402(c)(1)	3
Section 334(b)(2), 42 U.S.C. (Supp. IV)	1300
402(e)(2)	5
Section 334(b)(2), 42 U.S.C. (Supp. IV)	2 - 1
402(c)(2)(A)	4
Section 334(d)(1), 42 U.S.C. (Supp. IV)	
402(f)(1)	3
Section 334(f), 42 U.S.C. (Supp. IV) 402	
note	34a
Section 334(g), 42 U.S.C. (Supp. IV)	
402 note	8, 32a
Section 334(g)(1), 42 U.S.C. (Supp. IV)	
402 note	3, 32a
Section 334(g)(1)(A), 42 U.S.C. (Supp.	-
IV) 402 note	32a
Section 334(g)(1)(B), 42 U.S.C. (Supp.	0 00
IV) 402 note	6, 3Za
Section 334(g)(2), 42 U.S.C. (Supp. IV)	1 900
402 note	1, 024
402 note	19 19
	21, 33a
	, 504

Miscellaneous:	Page
H.R. Conf. Rep. No. 95-837, 95th Cong., 1st	
Sess. (1977)	
H.R. Rep. No. 95-702 (Pt. 1), 95th Cong.,	
1st Sess. (1977)	2, 10
President Carter's Social Security Propos- als: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means, 95th Cong., 1st Sess.	
(1977)	3
S. Conf. Rep. No. 95-612, 95th Cong., 1st	
Sess. (1977) 5, 9, 12,	20, 21
S. Rep. No. 95-572, 95th Cong., 1st Sess.	
(1977) 4,	10, 21

In the Supreme Court of the United States

OCTOBER TERM, 1982

No.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v

ROBERT H. MATHEWS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App. A, infra, 1a-9a) is not reported. The opinions arising out of the administrative proceedings (Apps. D, E and F, infra, 13a-14a, 15a-22a, 23a-26a) are not reported.

JURISDICTION

The judgment of the district court (App. G, infra, 27a-28a) was entered on August 25, 1982. The notice of appeal (App. H, infra, 29a) was filed on September 21, 1982. On November 10, 1982, Justice Powell extended the time for docketing an appeal to and including December 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set out in App. I, infra, 30a-34a.

STATEMENT

1. The Social Security Act provides spousal benefits for the widows, widowers, wives and husbands of retired and disabled wage earners (42 U.S.C. (& Supp. IV) 402(b) and (c)). Spousal benefits are based on the earnings of the retired or disabled wage earners, and are available to persons age 62 or over who are entitled to either minimal or no old-age or disability benefits on their own account. Prior to December 1977, the Act imposed a dependency requirement on husbands seeking spousal benefits—benefits were payable only if husbands could demonstrate dependency on their wage earner wives for one-half of their support. Former 42 U.S.C. 402(c)(1)(C) (App. I, infra, 31a). Wives, on the other hand, could qualify for benefits without having to satisfy a dependency requirement. 42 U.S.C. 402(b).

On March 2, 1977, this Court held that the one-half support requirement for widowers' benefits under former 42 U.S.C. 402(f) violated the equal protection component of the Due Process Clause of the Fifth Amendment. Califano v. Goldfarb, 430 U.S. 199 (1977). Thereafter, on March 21, 1977, the Court summarily affirmed two district court decisions striking down the one-half support requirement for husbands' benefits. Califano v. Silbowitz, 430 U.S. 924 (1977);

Jablon v. Califano, 430 U.S. 924 (1977).

Largely in response to these decisions, Congress amended the Social Security Act in December 1977. Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509, 42 U.S.C. (Supp. IV) 301 et seq. One of Congress' objectives in amending the Act was to eliminate the "gender-based differences of treatment for men and women under present law." H.R. Rep. No. 95-702 (Pt. 1), 95th Cong., 1st Sess. 4 (1977). Congress eradicated two of those differences in the then-existing law by removing the constitutionally objectionable one-half support eligibility requirements for husbands' and

widowers' benefits. Section 334(b)(1) and (d)(1) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402(c)(1) and (f)(1).1

Although eliminating the one-half support requirement removed a constitutional infirmity from the Act. it created a serious fiscal problem for the Social Security trust fund. Generally, a person entitled to two different Social Security benefits does not receive the full amount of both benefits, because the two benefits are offset against each other, 42 U.S.C. 402(k)(3)(A).2 In 1977, however, federal and state government pensions were not subject to the general offset provisions of the Social Security Act, and a recipient of such a pension could receive both his government pension and unreduced spousal benefits if he qualified for spousal benefits. Elimination of the one-half support requirement made substantial numbers of retired male federal and state employees eligible for unreduced spousal benefits based on their wives' earnings. "This result[ed] in 'windfall' benefits to some retired government employees." See also President Carter's Social Security Proposals: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means, 95th Cong., 1st Sess. 158 (1977) (statement of Robert M. Ball).

In order to reduce the drain on the Social Security trust fund arising from elimination of the one-half support requirement, Congress included a "pension offset"

¹ The 1977 amendments did not eliminate all gender-based distinctions in the Act, however. Although the one-half support requirement for widowers and husbands was removed from the Act in 1977, the question whether to eliminate other gender-based distinctions was subjected to further study. H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 73 (1977).

² For example, if an individual is entitled both to benefits on his own work account and to spousal benefits, the worker's benefit is paid in full, with spousal benefits limited to the amount, if any, by which those benefits exceed the worker's benefit.

provision in the 1977 amendments to the Act. This offset provision generally requires that spousal benefits be reduced by the amount of certain state or federal government pensions received by an eligible spouse.3 Section 334(a)(2) and (b)(2) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402(b)(4)(A) and (c)(2)(A). See S. Rep. No. 95-572, 95th Cong., 1st Sess. 27-28 (1977). But, while the "pension offset" was a reasonable and equitable means of dealing with windfall spousal benefit payments to federal and state retirees who, prior to 1977, had no expectation of receiving them. Congress was concerned with the effect of the new offset provision on those persons who were already retired or about to retire from government service and who, through no fault of their own, had planned their retirements on the assumption that they would receive full unreduced spousal benefits. Faced with the prospect of depriving this latter group of spouses of the benefits they had expected to receive. Congress elected to except them from the operation of the pension offset provision. Section 334(g)(1) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402 note. This provision excepts from the operation of the pension offset those spouses eligible for a government pension prior to December 1982 who would have been eligible for full spousal benefits under the Act "as it was in effect and being administered in January 1977." As noted above, in January 1977 the Act required husbands, but not wives, to demonstrate dependency on their wage earner spouses prior to receiving spousal benefits.

The pension offset exception also contains a severability clause which states that "[i]f any provision of

³ Government pensions are subject to the offset if the employment upon which the pension is based was not covered under Social Security on the last day the individual was employed. Section 884(a)(2) and (b)(2) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402(b)(4)(A) and (c)(2)(A).

this subsection * * * is held invalid * * * the application of this subsection to any other persons or circumstances shall also be considered invalid." Section 334(g)(3) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402 note. The severability clause was included "so that if [the pension offset exception] is found invalid the pension-offset as passed by the Senate would not be affected, and the application of the exception clause would not be broadened to include persons or circumstances that are not included within it." H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 71-72 (1977); S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. 71-72 (1977).

2. On November 18, 1977, appellee retired from employment with the United States Postal Service (App. A. infra, 2a). His wife had retired from her employment four months earlier, and was fully insured under the Social Security Act (ibid.). In December 1977, appellee filed an application for husband's benefits on his wife's account (ibid.). On March 23, 1978, the Social Security Administration informed appellee that, although he was entitled to husband's insurance benefits of \$153.30 per month,4 this amount would be offset dollarfor-dollar by his \$573 per month Postal Service pension. in accordance with the provisions of Section 334(a)(2) and (b)(2) of the Social Security Amendments of 1977. 42 U.S.C. (Supp. IV) 402(b)(4)(A) and (c)(2) (App. A. infra, 2a). No net spousal benefits were therefore payable to appellee.

Appellee sought reconsideration of the Social Security Administration's initial decision (App. F, infra, 23a) and was subsequently granted a hearing before an administrative law judge (ALJ). The ALJ concluded that the pension offset provisions of the 1977 amendments applied to appellee, inasmuch as he did not fall

^{*} Social Security Award Certificate, dated March 13, 1978 (Tr. 45). ("Tr." refers to the transcript of the administrative proceedings in this case.)

within the terms of the pension offset exception provided by Section 334(g)(1), 42 U.S.C. (Supp. IV) 402 note (App. E, infra, 20a). "Since claimant did not meet the dependency requirements of the law in effect in January of 1977, the government pension offset must be applied on a dollar-for-dollar basis against the amount of his husband's benefits. Since his pension exceeds the amount of his husband's insurance benefits, nothing is payable to him" (ibid.). The decision of the ALJ was affirmed by the Appeals Council on October 11, 1979, and became the final decision of the Secretary of Health and

Human Services (App. D, infra, 13a-14a).

3. Appellee brought this class action under Section 205(g) of the Act, 42 U.S.C. (Supp. IV) 405(g), seeking a declaration that Section 334(g)(1)(B) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402 note, denied him and others similarly situated the equal protection of the laws. Appellee contended that enforcing the pension offset provisions of the 1977 amendments against him, and not against similarly situated nondependent women, was unconstitutional. Appellee also asserted that the severability clause contained in Section 334(g)(3) of the 1977 amendments was unconstitutional. On August 11, 1982, the district court entered an order certifying a nationwide class composed of "all applicants for husbands' insurance benefits * * * whose applications * * * have been denied [on or after October 12, 1979] solely because of the statutory requirement that husbands must have received more than one-half of their support from their wives in order to be entitled to benefits" (App. B, infra, 10a). Two weeks later the district court entered an opinion (App. A, infra, 1a-9a) and order (App. G, infra, 26a-27a) holding both Section 334(g)(1)(B) and its severability clause unconstitutional.

The district court noted that Section 334(g)'s exception to the pension offset provision "differentiates between men (who must prove they received at least one-

half of their support from their wives in order to fall within the exception) and women (who need not prove any spousal support to fall within the exception)" (App. A, infra, 4a). This "gender-based classification," the court concluded, can be constitutional only if it "'serve[s] important governmental objectives and [is] substantially related to achievement of those objectives'" (ibid., quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

The district court recognized that the congressional purpose in enacting the pension offset exception was to protect the reliance interests of persons, primarily women, who planned their retirements from government service on the assumption that they would receive undiminished spousal benefits (App. A, infra, 5a). The court nevertheless reasoned that protection of these reliance interests did not justify incorporating a gender-specific requirement into the pension offset exception. "Congress, in requiring that men prove dependency, presumed that women would have relied upon the practices of the Social Security Administration, yet men would not have relied upon a decision of the Supreme Court" (ibid.).

The district court stated that the pension offset exception would be constitutional had Congress required both men and women to show dependency in order to obtain its benefits. This proposal was considered by Congress, but was ultimately rejected because of the administrative burdens it would create (App. A, infra, 5a-6a). Such efficiency considerations were found to be insufficient to save the statute. "[A]dministrative convenience," the court concluded, is "a wholly inadequate justification for gender-based discrimination" (id. at 6a). Because the court found "no rational basis for the discriminatory, gender-based classification contained in Section 334(g)(1)," it held that the "portion of the exception to the pension offset provision that requires a

male applicant to prove that he received one-half of his economic support from his wife violates the equal protection guarantees of the due process clause of the fifth amendment" (id. at 6a-7a).

The district court next noted that "Congress anticipated the likelihood that a court would declare the pension offset exception invalid" (App. A, infra, 7a). Congress specifically inserted a severability clause into the pension offset exception to prevent its application to non-qualifying claimants should any provision of the exception be held invalid (Section 334(g)(3), 42 U.S.C. (Supp. IV) 402 note). Notwithstanding the clear import of this provision, however, the court felt "compelled" to hold that the severability clause represents "an unconstitutional usurpation of judicial power by the legislative branch of the government" (App. A, infra, 7a).

The severability clause, the district court reasoned, was an attempt by Congress "to mandate the outcome of any challenge to the validity of the [pension offset] exception by making such a challenge fruitless" (App. A, infra, 8a). Moreover, the operation of the severability clause was found to be "in direct contravention of Congress' avowed intent to protect the expectation and reliance interests of those individuals who had retired or would retire within five years of the enactment of the pension offset" (ibid.). Because giving the severability clause effect would deny the benefits of the pension offset exception to anyone, the court concluded that "the severability clause is not an expression of the true Congressional intent, but instead is an adroit attempt to discourage the bringing of an action by destroying standing" (ibid.). The court accordingly ordered that the pension offset exception be expanded to include nondependent husbands, permitting appellee and all other class members to collect benefits free from the pension offset provisions of the 1977 Social Security

amendments (id. at 9a). The court recognized that its decision "will create a financial drain upon the Social Security fund" (ibid.), but dismissed this consideration as irrelevant. "The economic aspects of this case * * * cannot outweigh the importance of preserving fundamental constitutional values" (ibid.).

THE QUESTION IS SUBSTANTIAL

The decision of the district court invalidates two significant provisions of the Social Security Act and imposes a substantial financial drain upon the Social Security trust fund. In enacting the Social Security Amendments of 1977, Congress determined, after careful consideration, that governmental pensions must be offset against spousal benefits to reduce costs and to prevent millions of retired state and federal workers from receiving double benefits. Congress then crafted a narrowly limited exception to this pension offset requirement to protect the reliance interests of those "who are already retired, or close to retirement, from public employment and who cannot be expected to readjust their retirement plans to take account of the 'offset' provisions that will apply in the future." H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 71-72 (1977); S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. 71-72 (1977). The severability clause inserted into the exception provision evidences Congress' clear intent that the benefits of the provision not be extended beyond the class defined by Congress. Ibid. The district court's decision thwarts this carefully designed plan by holding both the exception provision's reliance on a gender-based classification and its severability clause unconstitutional, thereby thrusting significant unanticipated financial burdens on the Social Security system.

^{*} The district court subsequently stayed its order pending appeal to this Court (App. C, infra, 12a).

The decision clearly deserves the attention of this Court.

1. Congress was mindful of this Court's March 1977 decisions invalidating the one-half support requirement for husbands' benefits when it amended the Act in December 1977. See S. Rep. No. 95-572, 95th Cong., 1st Sess. 27 (1977). In fact, one of Congress' purposes in passing the 1977 amendments was to eliminate the gender-based distinction found objectionable in Califano v. Goldfarb, supra, and related cases. H.R. Rep. No. 95-702 (Pt. 1), 95th Cong., 1st Sess. 4 (1977). Elimination of the one-half support requirement for widowers' and husbands' benefits, however, dramatically expanded the number of potential spousal beneficiaries. This in turn resulted in the windfall payment of unreduced husbands' benefits to retired government workers who in most instances were not dependent upon their spouses, thus imposing a severe financial burden on the Social Security trust fund. Congress therefore determined that a pension offset provision, similar to the one applicable to workers in the private sector, was a reasonable and equitable means of dealing with this potential windfall and budgetary crisis.

Although the pension offset alleviated one problem, Congress was concerned that some present and future retirees would be unjustly penalized if the pension offset were applied to them, because they had planned their retirements on the assumption that they could supplement their pensions with unreduced spousal benefits, in reliance on the pre-March 1977 terms of the Act. H.R. Conf. Rep. No. 95-837, supra, at 71-72. Congress was justifiably concerned with protecting those persons—primarily wives, but also husbands meeting the dependency test—who, for a significant period of time, had reasonably relied on receiving full spousal benefits and had planned their retirements accordingly.

Congress included the pension offset exception in the 1977 amendments to protect these reliance interests.

Congress' sole motivation in enacting the pension offset exception was to protect the expectancies of those persons who were already retired or who were nearing retirement. 6 The fact that Congress chose eligibility for spousal benefits in January 1977 as a criterion for exemption from the pension offset in no way suggests a sexually discriminatory animus. Congress selected the eligibility standards in effect on that date simply because the only persons who could have planned their retirements on the assumption that they would receive unreduced spousal benefits were those who would have been eligible for spousal benefits under the Act as it existed in January 1977. Those persons receiving government pensions who became eligible for spousal benefits under the Social Security Act solely as a result of the March 1977 decisions and the December 1977 amendments necessarily must have planned their retirements on the assumption that they would not receive any spousal benefits at all.

While the pension offset exception was plainly designed to protect the reliance interests of those individuals who had planned their retirements under the pre-1977 administration of the Social Security Act, the severability clause inserted into the exception embodies

The pension offset exception applies only to those spouses who meet the January 1977 statutory requirements and are eligible for ber fits prior to December 1982. Although the exception expired on December 1, 1982, this case did not become moot on that date. The exception, by its express terms, safeguards the spousal benefits of claimants filing after November 1982 so long as the claimants would have been eligible for a government pension prior to December 1982 had they made proper application for such benefits. Section 334(g)(2), 42 U.S.C. (Supp. IV) 402 note. In addition, benefits payable after December 1982 to claimants satisfying the offset exception prior to that date are not subject to the offset.

a clear legislative mandate to construe the exception narrowly. Section 334(g)(3) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402 note, was expressly included in the pension offset exception so that the provision "would not be broadened [by the courts] to include persons or circumstances that are not included within it." H.R. Conf. Rep. No. 95-837, supra, at 71-72; S. Conf. Rep. No. 95-612, supra, at 71-72. The clause represents Congress' determination that, if the reliance interests of the class defined in the pension offset exception cannot be protected, reliance interests in general must give way to the overriding public policy contained in the pension offset provisions of the 1977 legislation.

The district court's decision rejects Congress' considered judgment that, except for a limited class of retirees who legitimately relied on receiving unreduced spousal benefits, fiscal necessity requires the immediate offset of government pensions against spousal benefits. Instead, the district court has postponed for five years the start of the offset program, resulting in enormous expense for the Social Security trust fund. This decision, in a nationwide class action, frustrates the will of Congress and plainly warrants review by this Court.

⁷ The Social Security Administration estimates that, even based on conservative assumptions, the district court's extension of spousal benefits to previously unqualified claimants will cost in excess of \$140 million from October 1979 through December 1982 alone.

^{*} The pension offset exception has been the subject of much recent litigation. In Rosofsky v. Schweiker, 523 F. Supp. 1180 (E.D.N.Y. 1981), the district court held that the exception's use of the one-half support test was unconstitutional, but the court nevertheless applied the severability clause to uphold the Secretary's denial of benefits. This court noted probable jurisdiction of the Secretary's appeal, No. 81-1551 (May 2, 1982), but the claimant failed to appeal the denial of his benefits, and the

 In addition to the importance of the question presented here, further review is required because the district court's legal analysis of the pension offset exception and severability clause is erroneous.

a. The pension offset exception is gender neutral on its face. It states that "individual[s]" receiving or becoming eligible to receive government pensions within a five-year period who would have qualified for spousal benefits under the Act "as it was in effect and being administered in January 1977" are exempt from the pension offset. Section 334(g)(1), 42 U.S.C. (Supp. IV) 402 note. By its terms, the provision protects not only

Secretary thus was forced to move this Court to dismiss the government's appeal. That motion was granted on June 22, 1982. In Miller v. Department of Health and Human Services, 517 F. Supp. 1192 (E.D.N.Y. 1981), the court upheld the pension offset exception in the face of an equal protection challenge. In Webb v. Harris, 509 F. Supp. 1091 (N.D. Cal. 1981), appeal pending, No. 81-4256 (9th Cir.), the district court held that a government pensioner did not have to satisfy the January 1977 one-half support requirement because Congress could not be presumed to have incorporated an unconstitutional criterion in the pension offset exception. The government has appealed, maintaining that Congress plainly intended to incorporate all of the January 1977 criteria and that the pension offset exception, so construed, does not violate the equal protection component of the Fifth Amendment. The district court in Wachtell v. Schweiker, No. 80-8022-Civ. ALH (S.D. Fla. Jan. 26, 1982), appeal pending, No. 82-5552 (11th Cir.), reached the same result as did the court in Webb.

There are also three unreported decisions dealing with the pension offset exception. Duffy v. Harris, No. 79-386 (D.N.M. Oct. 23, 1979) (exception held constitutional); Hudgins v. Harris, No. M-79-1939 (D. Md. Apr. 17, 1980) (pension offset held valid); Caloger v. Harris, No. H-80-388 (D. Md. Mar. 25, 1981) (non-dependent claimants have no standing to challenge the constitutionality of the pension offset exception because, if successful, they could not gain relief because of severability clause). Currently pending are at least four cases challenging the constitutionality of the pension offset exception.

wives but also those husbands who, because they rely on their wives for one-half of their support, satisfy the

January 1977 requirements for spousal benefits.

Although the exception is facially neutral, it does incorporate a gender-specific eligibility standard. That standard, which requires husbands (but not wives) to demonstrate dependency on their wage-earner spouses for one-half of their support, has been held to be an unconstitutional eligibility criterion in certain circumstances. Califano v. Goldfarb, 430 US. 199 (1977): Califano v. Silbowitz, 430 U.S. 924 (1977); Jablon v. Califano, 430 U.S. 924 (1977). These decisions, however, do not require the invalidation of the one-half support rule as incorporated into the pension offset exception. Nothing in the above decisions suggests that it is unconstitutional for Congress to protect the economic interests of persons who justifiably relied on receiving unreduced spousal benefits. Cf. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971).

In order to withstand scrutiny under the equal protection component of the Due Process Clause, "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). In Goldfarb, a five-to-four decision with no majority opinion, the plurality held that a gender-specific one-half support requirement, based as it was on "'old notions'" and "'archaic and overbroad' generalizations" about women, violated the Due Process Clause because it did not "serve important governmental objectives" and was not Substantially related to the achievement of those objectives." 430 U.S. at 210-211 (citations omitted). Similar sentiments were echoed by Justice Stevens in his decisive concurring opinion. "It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate the terms 'widow' and 'dependent surviving

spouse." 430 U.S. at 222 (Stevens, J., concurring). It was this "automatic reflex" that persuaded Justice Stevens that "this discrimination against a group of males is merely the accidental byproduct of a traditional way of thinking about females." *Id.* at 222-223.9

In enacting the pension offset exception invalidated by the court below, Congress was not motivated by a sexist animus, nor did it intend to effectuate and perpetuate discredited stereotypes regarding the proper roles and perceived frailties of women. Califano v. Goldfarb, supra, 430 U.S. at 210-211. The exception was not, in any sense, a reflexive congressional reaction or an "accidental byproduct" of traditional thinking regarding sexual roles. Id. at 222-223 (Stevens, J., concurring). Elimination of the unconstitutional one-half support requirement in 1977 significantly expanded the class of potential spousal beneficiaries. Congress, well aware that this class of newly eligible spousal beneficiaries included significant numbers of government pensioners who may have contributed little or nothing to the Social Security trust fund, enacted a pension offset to prevent those beneficiaries from receiving dual benefits. But Congress also realized that application of the pension offset to some retirees was unjust. Accordingly, it enacted the pension offset exception in order to protect those retired or soon-to-be retired spouses who reasonably relied on the terms of the pre-Goldfarb spousal benefits provisions. The stated purpose of the grandfather provision, in contrast to the one-half support rule as originally enacted, is not to protect pre-

⁹ Justice Stevens, however, suggested that he would have sustained the one-half support rule had it been the result of a conscious "legislative Jecision to favor females in order to compensate for past wrongs, or a legislative decision that the administrative savings exceed the cost of extending benefits to nondependent widows." 430 U.S. at 222 (Stevens, J., concurring).

sumptively dependent or helpless women, but rather to protect those spouses—wives and husbands alike—who stood to be demonstrably and seriously harmed by the 1977 amendments. Thus, the pension offset exception is supported by real, legitimate economic considerations totally unrelated to any presumed differences between men and women.¹⁰

¹⁰ This Court has repeatedly upheld similar gender-based classifications when supported by solid economic or other relevant considerations. For instance, in Califano v. Webster, 430 U.S. 313 (1977), the Court upheld a Social Security formula that slightly favored women in the calculation of average monthly wages. The Court found the distinction constitutional because Congress had passed it in response to statistics indicating that it is more difficult for older women than older men to obtain reasonable employment and that older women, even if they find employment, are paid considerably less. Similarly, the Court upheld a state property tax exemption granted to widows but not widowers in Kahn v. Shevin, 416 U.S. 351 (1974). The Court, citing data indicating that women's median incomes were substantially below those for men, and recognizing that "Itlhe disparity is likely to be exacerbated for the widow * * * [who] in many cases * * * will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer" (416 U.S. at 354) footnote omitted held that the differential treatment was justified. In Schlesinger v. Ballard, 419 U.S. 498 (1975), the court upheld reduction in force statutes that allowed women Naval and Marine officers a longer period of tenure than men officers before being mandatorily discharged. Because women officers were generally ineligible for sea duty, the classification "reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service." 419 U.S. at 508 (emphasis in original). Finally, the Court recently upheld all-male draft registration (Rostker v. Goldberg, 453 U.S. 57 (1981)), and the California statutory rape statute, under which only men can be criminally liable. Michael M. v. Superior Court, 450 U.S. 464 (1981).

The pension offset exception clearly serves the important governmental objective of protecting reliant spouses against financial hardships that could result from an unexpected reduction of spousal benefits. See United States Railroad Retirement Board v. Fritz. 449 U.S. 166, 177 (1980). The provision also promotes the substantial government interest in maintaining citizens' confidence in the fair and orderly processes of government. The exception, furthermore, is substantially related to the achievement of these important objectives. By incorporating the 1977 eligibility requirements into the provision. Congress has perfectly tailored the exception to those persons who actually relied on pre-Goldfarb law. As explained above, the only persons who could have planned their retirements on the assumption that they would receive unreduced spousal benefits are those who could have qualified for them in January 1977. Finally, by limiting eligibility for the exemption to a five-year period, Congress has adopted the least restrictive means consistent with the achievement of those objectives. See also City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976).

United States Railroad Retirement Board v. Fritz, sipra, provides a striking parallel to the instant case. In Fritz, this Court upheld against an equal protection challenge a grandfather provision in the Railroad Retirement Act of 1974, 45 U.S.C. (& Supp. IV) 231, which, like the present case, exempted specified classes of railroad employees from the elimination of certain dual retirement benefits. In sustaining the grandfather provision, the Court noted that Congress could properly protect the economic "expectations" (449 U.S. at 177) of certain classes of employees by means of a grandfather provision, and that the applicability of such a grandfather provision could be limited to those employees having the "greater equitable claim to [unreduced] benefits" (id. at 178). Congress has attempted to

achieve the same results here. As in Fritz, Congress sought to eliminate dual retirement benefits while at the same time protecting those present and future retirees who legitimately relied on the receipt of such benefits. In both instances Congress attempted to preserve the integrity of the federal treasury while recognizing the relative equities of those affected by the change in the law. Such action was consistent with the equal protection component of the Fifth Amendment in Fritz, and nothing in the present case requires a different result.

b. The district court invalidated the severability clause contained in Section 334(g)(3) of the pension off-set exception, 42 U.S.C. (Supp. IV) 402 note, on the ground that it represented "an unconstitutional usurpation of judicial power by the legislative branch of the government" (App. A, infra, 7a). With due respect, however, we submit that by ignoring the clear legislative intent expressed in Section 334(g)(3), and by ordering the payment of Social Security benefits to a class of persons not entitled to them by statute, the district court has improperly intruded upon the prerogatives of

Congress.

This Court has often considered the "inherent problem of challenges to underinclusive statutes" (Orr v. Orr. 440 U.S. 268, 272 (1979)) and the "remedial alternatives" of "extension" and "nullification" (Catifano v. Westcott, 443 U.S. 76, 89 (1979)), without suggesting that a legislative determination not to sever a benefit statute following a holding of partial invalidity would raise constitutional problems. See Stanton v. Stanton, 421 U.S. 7, 17 (1975); Craig v. Boren, 429 U.S. 190, 210 n.24 (1976); Stanton v. Stanton, 429 U.S. 501, 504 n.4 (1977). In any event, the district court's premise that Section 334(g) is merely "an adroit attempt to discourage the bringing of an action by destroying standing" is plainly mistaken (App. A, infra, 8a).

"Separability clauses, including the one involved in this case, have merely a potential effect on the outcome of litigation." Rosofsky v. Schweiker, 523 F. Supp. 1180, 1188 (E.D.N.Y. 1981), prob. juris. noted, No. 81-1551 (May 2, 1982), appeal dismissed (June 22, 1982). A severability clause is "not an inexorable command." Dorchy v. State of Kansas, 264 U.S. 286, 290 (1924). Thus, even though the severability clause in this case creates a presumption that if the pension offset exception is invalid the pension offset provisions will thereafter be applied to all applications for spousal insurance benefits, that result is not such a foregone conclusion that appellee lacks standing. Rather, at the time this suit was filed there was the possibility that appellee would benefit from a favorable decision of the district court. See Orr v. Orr. supra, 440 U.S. at 271-273.

Moreover, appellee would have standing to challenge the pension offset exception even if it were clear from the outset that the pension offset provisions are not severable. Appellee has no constitutional right to the receipt of dual pension benefits; his right is to be treated consistently with the Due Process Clause in regard to eligibility for such benefits. Even if appellee could not obtain dual pension benefits directly from the lawsuit, he could still "derive [the] personal benefit" (App. A. infra. 8a) of having the offset exception struck down as to wives and dependent husbands, so that all benefit recipients would be treated equally. If the offset exception were invalidated as to all claimants, and Congress were thus made aware that it could not draw the line as it did. Congress would have the opportunity to reconsider whether to extend the offset exception to everyone, including the members of appellee's class. Hence, contrary to the district court's assertion (ibid.), the severability clause does not destroy the incentive of persons such as appellee to bring suit challenging the pension offset exception. See Or:

v. Orr, supra, 440 U.S. at 271-273. Appellee, therefore, clearly had standing to contest the Secretary's application of the 1977 pension offset provisions to his spousal benefits, and Section 334(g)(3) cannot be invalidated as an unconstitutional attempt to destroy that standing.

The district court's failure to apply the severability clause in this case flies squarely in the face of the legislative intent animating the Social Security Amendments of 1977. The severability clause provides, in the clearest terms, that "[i]f any provision of [the pension offset exception), or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of the [pension offset exception] to any other persons or circumstances shall also be considered invalid" (Section 334(g)(3), 42 U.S.C. (Supp. IV) 402 note). The clause plainly expresses Congress' intent "that if [the pension offset exception is found invalid the pensionoffset as passed by the Senate would not be affected. and the application of the exception clause would not be broadened to include persons or circumstances that are not included within it." H.R. Conf. Rep. No. 95-837. supra, at 71-72; S. Conf. Rep. No. 95-612, supra, at 71-72.

Section 334(g)(3) is a "strong severability clause" (Califano v. Westcott, supra, 443 U.S. at 90) and is entitled to substantial deference by a court construing the pension offset exception. The district court's conclusion (App. A, infra, 8a) that the severability clause "is not an expression of the true Congressional intent" is clearly in error. The legislative history of the Social Security Amendments of 1977 unmistakably reveals Congress' conclusion that state and federal government pensions must be offset against spousal benefits in order to eliminate double benefits and staunch a substantial drain on the Social Security trust fund occasioned by the eliminate

nation of the one-half support requirement. S. Rep. No. 95-572, supra, at 27-28. The pension offset exception, although designed to "protect the expectation and reliance interests of those individuals who had retired or would retire within five years of the enactment of the pension offset" (App. A, infra, 8a), is plainly subsidiary to the congressional intent to eliminate double benefits and reduce costs. H.R. Conf. Rep. No. 95-837, supra. at 71-72; S. Conf. Rep. No. 95-612, supra, at 71-72. The severability clause embodies Congress' considered conclusion that, should the courts determine that the pension offset exception cannot be limited to the class it defined, reliance and expectation interests must give way to the overriding policy underlying the pension offset provisions of the 1977 legislation. Section 334(g)(3), in effect, is a "nonseverability" clause, clearly evidencing "that the Legislature would not have enacted those provisions [of the pension offset exception] which are within its power, independently of that which is not." Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam) (quoting Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932)). The district court erred in ignoring the plain congressional direction embodied in Section 334(g)(3).

The district court's decision has recreated the same fiscal crisis that Congress found intolerable in 1977. Substantial numbers of retired male federal and state employees are once again eligible for spousal benefits based on their wives' earnings, in direct conflict with the clear intent of Congress. Review by this Court is

plainly warranted.

CONCLUSION

Probable jurisdiction should be noted. Respectfully submitted.

> REX E. LEE Solicitor General

J. PAUL McGrath
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

RICHARD G. WILKINS
Assistant to the Solicitor General

ROBERT S. GREENSPAN FRANK A. ROSENFELD Attorneys

DECEMBER 1982

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

CIVIL ACTION NO. 79-G-5251-NE

Filed: August 24, 1982

Entered: August 25, 1982

ROBERT H. MATHEWS AND MARY M. MATHEWS, AND OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

MEMORANDUM OPINION

Plaintiff, Robert H. Mathews, brings this action individually and on behalf of all other persons similarly situated, and seeks to have this court declare unconstitutional the pension offset provisions of Section 202(c)(2), 42 U.S.C. § 402(c)(2), contained in Section 334(b)(2) and (g) of Public Law 95-216. Plaintiff Mathews represents a class comprised of all applicants for husbands' insurance benefits under Section 202(c)(2) of the Social Security Act, 42 U.S.C. § 402(c)(2), whose applications, requests for reconsideration, hearings, or Appeals Council reviews have been denied solely because of the statutory requirement that husbands must have received more than one-half of their support from their wives in order to be entitled to benefits, and who received notice of such denials on or after the 60th day prior to December 11, 1979.1

¹ The court certified the class in its order entered August 11, 1982.

Robert Mathews retired from employment with the United States Postal Service on November 18, 1977. His wife, Mary, had retired from her employment four months earlier than Mr. Mathews, and was fully insured under the Social Security Act. In December of 1977, Mr. Mathews filed an application for husband's insurance benefits based upon his wife's earnings record. In connection with his application for benefits under Section 202(c) of the Social Security Act, 42 U.S.C. § 402(c), Mr. Mathews informed the Social Security Administration that as a result of his own employment record, he was receiving a civil service pension of \$573.00 per month. On March 23, 1978, the Social Security Administration advised the plaintiff that although he was entitled to husband's insurance benefits under § 202(c), the amount of his monthly benefit would be offset dollar-for-dollar by the amount of his civil service retirement pension, in accordance with the provisions of the 1977 amendments to the Social Security Act contained in Section 334 of Public Law 95-216. Because the amount of his pension exceeded the amount of the monthly benefit, Mr. Mathews was notified that he could receive no payments from Social Security. The plaintiff was granted a hearing before an administrative law judge, who affirmed the Administration's denial of benefits, stating that the plaintiff did not fall within the exception to the pension offset because he had not been receiving at least one-half of his support from his wife. The decision of the administrative law judge was affirmed upon review by the Appeals Council and became the final decision of the Secretary.

The pension offset provision set forth in § 202(c)(2) of the Social Security Act, 42 U.S.C. § 402(c)(2), was enacted in 1977 as an amendment to the husband's insurance benefits section of the Act. P.L. 95-216, the Social Security Amendments of 1977, § 334(b)(2) (December 20, 1977). The Social Security Amendments of 1977 also contain an exception to the operation of the pension offset provision. Section 334(g)(1) of P.L. 95-216 provides that the pension offset is inapplicable to individuals who retired within five years of the enactment and who meet the requirements of § 202(c) of the Act as it existed and was administered in January of 1977. Section 202(c), 42 U.S.C. § 402(c), as it existed in January 1977 required that a husband receive one-half of his support from his wife in order to be entitled to husband's insurance benefits. In essence, therefore, the exception provides a five-year grace period for all women who retire within five years of the enactment, and for men who retire within five years of the enactment and who are economically dependent upon their wives.

In March of 1977, the Supreme Court declared unconstitutional the one-half support requirement for widowers' insurance benefits. Califano v. Goldfarb, 430 U.S. 199, 51 L. Ed. 2d 270, 97 S. Ct. 1021 (1977). Shortly after the Goldfarb decision, the Supreme Court summarily affirmed two lower court decisions that had declared unconstitutional the one-half support requirement for husbands' insurance benefits contained in § 202(c), Califano v. Silbowitz, 430 U.S. 924, 51 L. Ed. 2d 768, 97 S. Ct. 1539 (1977), affirming Silbowitz v. Secretary of Health, Educ. & Welfare, 397 F. Supp. 862 (S.D. Fla. 1975); and Califano v. Jablon, 430 U.S. 924, 51 L. Ed. 2d 768, 97 S. Ct. 1539 (1977), affirming 399 F. Supp. 118 (D. Md. 1975). The Court found in the Goldfarb, Silbowitz, and Jablon cases that the requirement that only males provide proof of economic dependency upon their spouses in order to receive benefits constituted an impermissible gender-based classification violative of the equal protection guarantees of the due process clause of the fifth amendment. Although the Court's analysis in Goldfarb centered upon the statute's

discriminatory impact upon female wage earners,² the Court acknowledged that such requirements also had an unconstitutional impact upon males. 430 U.S. at 209, n.8, 51 L. Ed. 2d at 278, n.8, 97 S. Ct. 1028, n.8; and 430 U.S. at 217, 51 L. Ed. 2d at 283, 97 S. Ct. at 1032 (Stevens, J., concurring).

As a result of Goldfarb and its progeny, the unconstitutionality of the one-half support requirement was determined prior to congressional enactment of the pension offset provision and the exception to the pension offset. One of the issues before this court is whether the one-half support requirement of § 202(c), although unconstitutional as a substantive provision, is constitutional when applied as a part of the exception to the pension offset provision.

Clearly, the exception to the pension offset provision differentiates between men (who must prove they received at least one-half of their support from their wives in order to fall within the exception) and women (who need not prove any spousal support to fall within the exception). Given the fact that the exception creates a gender-based classification, the question becomes whether the discriminatory classification "serve[s] important governmental objectives and [is] substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197, 50 L. Ed. 2d 397, 407, 97 S. Ct. 451, 457 (1976). The government contends that the gender-based discrimination contained in the pension

² The Court reasoned that to require a husband, but not a wife, to prove economic dependency upon a spouse constituted impermissible discrimination against female wage earners in that the taxes paid by female workers produced less protection for their spouses than the taxes paid by male workers. 430 U.S. 204, 206-07, 51 L. Ed. 2d 270, 275, 97 S. Ct. 1021, 1026-27. See also Weinberger v. Wiesenfeld, 420 U.S. 636, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975), and Frontiero v. Richardson, 411 U.S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973).

offset exception was rationally calculated to protect the reliance interests of individuals who had already retired when the offset provision became law, or who would retire within five years of the enactment of the offset. The Conference Report that accompanied the pension offset bill reveals that Congress was more concerned with the expectations of women than with the expectations of all soon-to-retire individuals:

The managers are concerned that there may be large numbers of women, especially widows in their late fifties, who are already drawing pensions, or would be eligible to draw them within 5 years of the date of the enactment of this bill, based on their non-covered work and whose retirement income was planned for on the assumption of the availability of full wife's or widow's benefits under Social Security.

Social Security Amendments of 1977, Conference Report No. 95-837, 95th Cong., 1st Sess., p. 72. Although the pension offset was enacted after the *Goldfarb* decision, wherein men were granted husbands' benefits without regard to dependency, Congress, in requiring that men prove dependency, presumed that women would have relied upon the practices of the Social Security Administration, yet men would not have relied upon a decision of the Supreme Court.

The court recognizes that most of the women eligible for benefits during the five-year period in question would probably have been able to show that they received at least one-half of their economic support from their husbands. Congress could easily have protected the reliance interest of these women by requiring a showing of economic dependency upon their husbands. Although Congress considered proof of dependency as a requirement for all applicants seeking to fall within the five-year grace period, it rejected the proposal under the presumption that to require women as well as men to prove dependency would create an administrative

burden upon the system. Report of the Committee on Finance, U.S. Senate, on H.R. 5322, Report No. 95-572, p. 28. Apparently, Congress presumed, just as it had presumed when it enacted the original one-half support requirement of § 202(c), that the majority of women would be economically dependent upon their husbands, and the majority of men would not be economically dependent.3 Therefore, in order to avoid the paper work that would be generated by a requirement that all applicants prove spousal dependency, Congress opted for administrative convenience. The court finds that administrative convenience is a wholly inadequate justification for gender-based discrimination. Califano v. Goldfarb, 430 U.S. 199, 212 n.9, 51 L. Ed. 2d 270, n. 9, 97 S. Ct. 1021, 1029 n. 9; Stanley v. Illinois, 405 U.S. 645, 656-57, 31 L. Ed. 2d 551, 562, 92 S. Ct. 1208, 1215 (1972); Frontiero v. Richardson, 411 U.S. 677. 690, 36 L. Ed. 2d 583, 594, 93 S. Ct. 1764, 1772 (1973); Reed v. Reed, 404 U.S. 71, 76, 30 L. Ed. 2d 225, 230, 92 S. Ct. 251, 254 (1971). Likewise, the court rejects the government's contention that an across-the-board dependency requirement is unfeasible because it would be subject to manipulation. Defendant's brief at 15. If such is the case, it would seem that the males-only dependency test would be subject to manipulation as well.

The Court concludes that there is no rational basis for the discriminatory, gender-based classification contained in Section 334(g)(1) of Public Law 95-216. The classification is not substantially related to the attainment of a valid statutory goal. Therefore, the court holds that that portion of the exception to the pension

³ The court notes that the women least likely to receive the benefits, those women who were not receiving one-half of their economic support from their husbands at the time of the enactment, are the ones who will benefit most from the statutory discrimination. See Califano v. Goldfarb, 430 U.S. at 221, 51 L. Ed. 2d at 285, 97 S. Ct. at _____ (Stevens, J., concurring).

offset provision that requires a male applicant to prove that he received one-half of his economic support from his wife violates the equal protection guarantees of the

due process clause of the fifth amendment.4

Congress anticipated the likelihood that a court would declare the pension offset exception invalid. Accordingly, a severability clause was inserted in the amendment, providing that "[i]f any provision of this subsection, or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid." P.L. 95-216, § 334(g)(3). The effect of this severability provision is that if any portion of the pension offset provision is stricken, then the pension offset will be applied to all government retirees, with no exceptions.

Although severability clauses are not per se invalid,⁵ under the circumstances of the present case, this court is compelled to hold that the severability clause pertaining to the pension offset exception is an unconstitutional usurpation of judicial power by the legislative branch of the government. When the pension offset provision was enacted, Congress was well aware of the fact that the Supreme Court had declared unconstitutional the requirement that husbands prove economic dependency upon their spouses in order to receive

⁴ See also Rosofsky v. Schweiker, 523 F. Supp. 1180 (S.D. N.Y. 1981), wherein the exception to the pension offset provision was held unconstitutional for reasons similar to those found by this court. It should also be noted that the constitutionality of both the offset provision and its exception was upheld in Duffy v. Harris, Dkt. No. 79-386 (D. N.M. Oct. 23, 1979). In Duffy, however, although the court discussed the rational basis of the pension offset, it failed to articulate findings with regard to the rational basis of the exception to the offset.

See, e.g., Califano v. Westcott, 443 U.S. 76, 61 L. Ed. 2d 382, 99 S. Ct. 2655 (1979).

benefits. By enacting a severability clause to accompany the unconstitutional requirement of the pension offset exception, Congress attempted to mandate the outcome of any challenge to the validity of the exception by making such a challenge fruitless. Even if a plaintiff achieved success in having the gender-based classification stricken, he would derive no personal benefit from the decision, because the pension offset would be applied to all applicants without exception.

The operation of the severability clause appears to be in direct contravention of Congress' avowed intent to protect the expectation and reliance interests of those individuals who had retired or would retire within five years of the enactment of the pension offset. Legislative history reveals that as to these retirees, Congress considered a five-year delay in the operation of the pension offset necessary to fundamental fair play. Yet, in a conflicting expression of Congressional intent, Congress would destroy the five-year grace period, along with the remainder of the pension offset exception, if

any part of the exception is held invalid.

Common sense dictates that in order to allow the elderly to plan their futures, Congress would choose not to destroy the five-year grace period of the pension offset exception. The court is convinced, therefore, that the severability clause is not an expression of the true Congressional intent, but instead is an adroit attempt to discourage the bringing of an action by destroying standing. See Caloger v. Mathews, Dkt. No. H-80-388 (D. Md. March 25, 1981). Such an "in terrorem" approach would insulate the legislative work product from judicial scrutiny, in violation of the doctrine of separation of powers. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). Clearly, Congress cannot be allowed to indirectly put into effect for five years a provision it was prohibited from effectuating directly.

For the foregoing reasons, the court finds that the severability clause contained in Section 334(g)(3) of Public Law 95-216 is unconstitutional. The court realizes that extending the five-year grace period to men as well as women will create a financial drain upon the Social Security fund. The economic aspects of this case, however, cannot outweigh the importance of preserving fundamental constitutional values. The defendant should be required to extend to the plaintiff and those members of the class he represents those benefits denied them as a result of the enforcement of the one-half support requirement of the pension offset exception. See Califano v. Westcott, 443 U.S. 76, 90, 61 L. Ed. 2d 382, 394, 99 S. Ct. 2655 (1979).

A separate order will be entered contemporaneously herewith.

Done this 24th day of August 1982.

/S/ J. FOY GUIN, JR.

United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

CIVIL ACTION NO. 79-G-5251-NE

Filed: August 10, 1982

Entered: August 11, 1982

ROBERT H. MATHEWS AND MARY M. MATHEWS, AND OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

ORDER

This cause is before the court upon the motion of the plaintiffs for certification of this cause as a class action. Having considered the motion, briefs, and arguments of counsel, as well as the stipulation of the parties that the class is so numerous that joinder of all members is impracticable, the court is of the opinion that all the requirements of Rule 23 of the Federal Rule of Civil Procedure have been met and that this cause should proceed as a class action. Accordingly, it is

ORDERED, ADJUDGED and DECREED that this cause be and it hereby is CERTIFIED as a class action. The class is hereby defined as all applicants for husbands' insurance benefits under Section 202(c) of the Social Security Act, 42 U.S.C. § 402(c)(2), whose applications, requests for reconsideration, hearings, or Appeals Council reviews have been denied solely because of the statutory requirement that husbands must have received more than one-half of their support from their wives in order to be entitled to benefits; and who re-

ceived notice of such denials on or after the 60th day prior to December 11, 1979.

It is further ORDERED that Robert H. Mathews

serve as a representative of said class.

It is further ORDERED that plaintiff Mary M. Mathews be and she hereby is DISMISSED as a plaintiff inasmuch as she lacks standing to be joined as a plaintiff in this cause, and inasmuch as the parties have agreed that her claims are due to be dismissed.

DONE and ORDERED this 10th day of August 1982.

/s/ J. Foy Guin, Jr.

United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

CIVIL ACTION NO. 79-G-5251-NE

Filed:October 12, 1982

Entered: October 12, 1982

ROBERT H. MATHEWS, ET AL., PLAINTIFFS,

W.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

ORDER

This cause came before the court upon defendant's motion for stay of judgment pending final disposition of the case on appeal. Having considered the motion, the court is of the opinion it is due to be granted. Accordingly, it is

ORDERED, ADJUDGED and DECREED that defendant's motion for stay be and it hereby is GRANTED, and this cause is hereby STAYED pending a final ruling on appeal by the Supreme Court of the United States.

DONE and ORDERED this 8th day of October 1982.

/S/ J. FOY GUIN, JR.

United States District Judge

APPENDIX D

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION P.O. BOX 2518 WASHINGTON, D.C. 20013

October 11, 1979

Refer to: SGC 424-09-7494 Office of Hearings and Appeals

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. Robert H. Mathews Post Office Box 54 Cullman, Alabama 35055

Dear Mr. Mathews:

After the request for review of the hearing decision was received, a careful study was made of your case, the applicable law and regulations, the record before the administrative law judge, and the contentions made in support of the request.

Section 404.947a of Social Security Administration Regulations No. 4 (20 CFR 404.947a) provides that the Appeals Council will review a hearing decision where: (1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is broad policy or procedural issue which may affect the general public interest.

The Appeals Council has concluded that there is no basis under the above regulations for granting the request for review. Accordingly, the hearing decision stands as the final decision of the Secretary in your

case.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing is otherwise made. See Section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, the Bill of Complaint should name the Secretary of Health, Education, and Welfare as the defendant and should include the social security number(s) shown at the top of this notice.

Sincerely yours,
DAVID G. DANZIGER
Member, Appeals Council

cc:

SEPSC, RR, RSI, Birmingham, AL. BO, Cullman (Decatur), AL. HO, Florence, AL. (ALJ Eddens, Jr)

APPENDIX E

DEPARTMENT OF HEALTH, EDUCATION, AND WEFLARE

SOCIAL SECURITY ADMINISTRATION BUREAU OF HEARINGS AND APPEALS

Name and Address of Claimant: Mr. Robert H. Mathews P.O. Box 54 Cullman, AL 35055

NOTICE OF UNFAVORABLE DECISION PLEASE READ CAREFULLY

If you disagree, in whole or in part, with the enclosed decision you may request the Appeals Council to review it. However, your request for review must be filed within 60 days after the date of receipt of this notice. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise. You (or your representative) may file a request for review at your local social security office or at the hearing office, or you may write or telephone one of these offices and indicate your intention to file a request for review. Your may send a written request for review directly to the Appeals Council, Bureau of Hearings and Appeals, SSA, P.O. Box 2518, Washington, D.C. 20013.

Unless you file a timely request for review by the Appeals Council, you may not obtain a court review of your case under section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act.

This notice and enclosed copy of hearing decision mailed September 6, 1979

cc:

Name and Address of Representative:

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE SOCIAL SECURITY ADMINISTRATION BUREAU OF HEARINGS AND APPEALS

DECISION

In the case of
Robert H. Mathews,
claimant

Mary M. Mathews,
(Wage Earner) (Leave blank if same as above)

Claim for
Husband's Insurance Benefits

424-09-7494

(Social Security Number)

This case is before the administrative law

This case is before the administrative law judge on a request for hearing.

ISSUES

Since it has been determined that claimant is entitled to husband's insurance benefits on the record of his wife, Mary M. Mathews, the only issue to be decided is whether the government pension offset was properly applied to his husband's insurance benefits.

LAW AND REGULATIONS

Section 202(c)(1) of the Social Security Act, as amended in 1977, provides that:

(c)(1) The husband (as defined in section 216(f) of an individual entitled to old-age or disability insurance benefits, if such husband—

(A) has filed application for husband's insurance benefits.

(B) has attained age 62, and (*see footnote 1)

(C) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount of his wife,

shall be entitled to a husband's insurance benefit for each month, beginning with the first month after August 1950 in which he becomes so entitled to such insurance benefits and ending with the month preceding the month in which any of the following occurs; he dies, his wife dies, they are divorced, or he becomes entitled to old-age or disability insurance benefits, based on a primary insurance amount which is equal to or exceeds one-half of the primary insurance amount of his wife, or his wife is not entitled to disability insurance benefits and is not entitled to old-age insurance benefits.

(2) (A) The amount of a husband's insurance benefits for each month as determined after application of the provisions of subsections (q) and (k) shall be reduced (but not below zero) by an amount equal to the amount of any monthly periodic benefit payable to such husband for such month which is based upon his earnings while in the service of the Federal Government or any State (or political subdivision thereof, as defined in section 218(b) (2) if, on the last day he was employed by such entity, such service did not constitute "employment" as defined in section 210.

(b) For purposes of this paragraph, any periodic benefit which otherwise meets the requirements of sub-

^{*} Footnote 1:

P.L. 95-216, § 334(b)(1), deleted subparagraph (C), and redesignated subparagraph (D) as subparagraph (C), effective for benefits payable for months beginning with December 1977 on the basis of applications filed in or after December 1977, except where benefits are based on earnings while in the service of the Federal Government or any State or Political subdivision.

paragraph (A), but which is paid on other than a monthly basis, shall be allocated on a basis equivalent to a monthly benefit shall constitute a monthly periodic benefit for purposes of subparagraph (A). For purposes of this subparagraph, the term "periodic benefit" includes a benefit payable in a lump sum if it is a commutation of, or a substitute for, periodic payments (*see footnote 2).

(3) Except as provided in subsection (q) and paragraph (2) of this subsection (*see footnote 3), such husband's insurance benefits for each month shall be equal to one-half of the primary insurance amount of his wife for such month.

Section 334 (g) of P. L. 95-216, the Social Security amendments of 1977 provided for reduced benefits for spouses receiving government pensions as follows:

(g)(1) The amendments made by the preceding provisions of this section shall not apply with respect to any monthly insurance benefit payable, under subsection (b), (c), (e), (f), or (g) (as the case may be) of section 202 of the Social Security Act, to any individual—

(a) to whom there is payable for any month within the 60-month period beginning with the month in which this Act is enacted (or who is eligible in any

^{*} Footnote 2:

P.L. 95-216, § 334(b)(2), amended paragraph (2) in its entirety, effective for benefits payable for months beginning with December 1977 on the basis of applications filed in or after December 1977, except where benefits are based on earnings while in the service of the Federal Government or any State, or political subdivision.

^{*}Footnote 3:

P.L. 95-216, § 334(b)(3), inserted "and paragraph (2) of this subsection" after "subsection (q)", effective for benefits payable for months beginning with December 1977 on the basis of applications filed in or after December 1977, except where benefits are based on earnings while in the service of the Federal Government or any State or political subdivision.

such month for) a monthly periodic benefit (within the meaning of such provisions) based upon such individual's earnings while in the service of the Federal Government or any State (or political subdivision thereof, as defined in section 218(b) (2) of the Social Security Act); and

(B) who at time of application for or initial entitlement to such monthly insurance benefit under such section (b), (c), (e), (f), or (g) meets the requirements of that subsection as it was in effect

and being administered in January 1977,

(2) For purposes of paragraph (10(A), an individual is eligible for a monthly periodic benefit for any month if such benefit would be payable to such individual for that month if such individual were not employed during that month and had made proper application for such benefit.

(e) If any provisions of this subsection, or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid.

EVIDENCE CONSIDERED

The administrative law judge has carefully considered all the testimony at the hearing, the arguments made, and the documents described in the List of Exhibits attached to this decisions.

EVALUATION OF THE EVIDENCE

It has been determined that claimant is entitled to husband's insurance benefits on the record of his wife, Mary M. Mathews.

The only question to be decided is whether the government pension offset was properly applied to his husband's insurance benefit. Claimant retired from the United States Postal Service effective November 18, 1977, and was awarded a Civil Service retirement annuity in the amount of \$573.00 per month. He was not receiving at least one-half of his support from his wife in January of 1977 or at the time she became entitled to retirement or disability insurance benefits.

The Government pension offset will apply to benefits payable December 1977 and thereafter if: (1) the individual is entitled to husband's or widower's insurance benefits; and (2) a pension from the Federal government, any State government, or any political subdivision thereof is payable to the individual; and (3) the pension is based on the individual's own earnings; and (4) the individual's earnings were not covered under the Social Security Act on the last day the individual was employed; and (5) the individual's entitlement is based on an application filed in or after December 1977.

The government pension offset will not apply if (1) the applicant would at the time for filing for husband's insurance benefits meet the requirements for entitlement to those benefits as they were in effect in January 1977, and (2) the applicant is receiving, or eligible to receive, a government pension for any month in the period December 1977 through November 1982.

In order to meet the requirements for husband's insurance benefits as they were in effect in January 1977, an individual must have been receiving one-half support from his wife at the beginning of her period of disability or at the time she became entitled to retirement insurance benefits.

Since claimant did not meet the dependency requirements of the law in effect in January of 1977, the government pension offset must be applied on a dollar-fordollar basis against the amount of his husband's benefits. Since his pension exceeds the amount of his husband's insurance benefits, nothing is payable to him.

It should be noted that that portion of the article written by the District Manager of the Nashville Social Security Office (exhibit 7) quotes the law as set forth above.

It appears that the article put out by the American Postal Workers Union (exhibit 11) does not correctly quote Public Law 95-216 which contained the above amendments. Of course, the law as enacted by Congress is the law and not what they interpreted it to say. It was only half right when it quoted the offset would not apply for a 5 year period beginning in December 1977. It omitted the other half of the exception that to be excepted the individual also had to meet all the requirements for entitlement that existed and were applied in January 1977. This exception will rarely apply for applicants for husband's or wildower's benefits since dependency on the spouse was a condition of entitlement as of January 1977.

In rendering this decision, the administrative law judge is not unmindful of Wienberger v. Wiesenfield, 420 U.S. 636, which probably prompted part of the above amendments. He is also familiar with Hurvich v. Califano, U.S. District Court, N. District of California, 457 F. Supp. 760 (1978). Of course, this latter case is not exactly in point and is also not a precedent for Fifth Circuit Cases.

While it is appreciated that claimant's frustration will increase each time he receives a notice of Social Security Benefit Information and Increase as set forth in exhibit 10, this merely indicates the amount to which he is entitled before offset takes place.

FINDINGS

1. Claimant is entitled to husband's insurance benefits beginning in January, 1978.

2. Claimant retired from the U.S. Postal Service effective November 18, 1977, and was awarded a Civil Service retirement annuity of \$573.00 per month.

 Claimant was not receiving at least one-half of his support from his wife at the time she became entitled to retirement or disability benefits nor in January 1977.

4. Claimant did not meet the dependency require-

ments of the law in effect in January 1977.

The government pension offset must be applied on a dollar-for-dollar basis against the amount of his husband's insurance benefits.

6. Since his pension exceeds the amount of his husband's insurance benefits, nothing is payable to him.

DECISION

It is the decision of the administrative law judge that the claimant is entitled to husband's insurance benefits on the earnings record of his wife, Mary M. Mathews. It is the further decision that the government pension offset as promulgated by the Social Security Amendments of 1977 applies and that as a result, no husband's insurance benefits are payable to him.

FRANK L. EDDENS, JR.
Administrative Law Judge

Date: SUP 6 1979

APPENDIX F

Social Security Notice of Reconsideration

From: Bureau of Retirement and Survivors Insurance Southeastern Program Service Center, Birmingham, Alabama 35285

Date: April 24, 1979

Your Claim Number: 424-09-7494

Mr. Robert H. Mathews P.O. Box 54 Cullman, Alabama 35055

Your claim has been reconsidered, as you requested. We find that the original decision was correct and in accordance with the law and regulations. The enclosed Reconsideration Determination fully explains the decision reached.

This reconsideration was made by a specially designated staff, different from the staff that made the original decision, and specially trained in the handling of reconsiderations. This staff made an independent and thorough examination of all the evidence on record about your claim.

If you believe that the Reconsideration Determination is not correct, you may request a hearing before an administrative law judge of the Bureau of Hearings and Appeals. If you want a hearing you must request it, not later than 60 days from the date you receive this notice. You should make any such request through any social security office. Please read the enclosed leaflet for a full explanation of your right to appeal.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE SOCIAL SECURITY ADMINISTRATION

RECONSIDERATION DETERMINATION

Program Center Southeastern Program Service Center Birmingham, Alabama 35285

District Office or Branch Office Cullman, Alabama

Name of Wage Earner or Self-Employed Person Mary M. Mathews

Social Security Claim No. 424-98-7494

Name of Claimant Robert H. Mathews

Type of Claim Husband's Insurance Benefits

Determination:

On December 15, 1977, Mr. Robert H. Mathews filed application for husband's insurance benefits on the record of his wife, Mary M. Mathews. He was found entitled in the amount of \$153.20 beginning January 1978 which was increased to \$163.20 beginning June 1978. These amounts were subsequently increased to \$158.60 and \$168.90 due to the inclusion of additional earnings for Mrs. Mathews. On March 13, 1978, Mr. Mathews was notified of his entitlement to benefits, but that no payment could be made because of his receipt of a government pension. On April 4, 1978, Mr. Mathews requested reconsideration, protesting the imposition of a government pension offset against his husband's benefit.

The question to be decided is whether the government pension offset was properly applied to Mr. Mathews' husband's insurance benefit.

Section 202(c)(2)(1)(A) of the Social Security Act, as amended in 1977, provides that the amount of a husband's insurance benefit shall be reduced by an amount equal to the amount of any monthly periodic benefit payable to such husband for such month which is based upon his earnings while in the service of the Federal government or any State (or political subdivision thereof as defined in Section 218(b)(2)) if, on the last day he was employed by such entity, such service did not constitute "employment," as defined in Section 210.

The Government pension offset will apply to benefits payable December 1977 and thereafter if: (1) the individual is entitled to husband's or widower's insurance benefits; and (2) a pension from the Federal government, any State government, or any political subdivision thereof is payable to the individual; and (3) the pension is based on the individual's own earnings; and (4) the individual's earnings were not covered under the Social Security Act on the last day the individual was employed; and (5) the individual's entitlement is based on an application filed in or after December 1977.

The government pension offset will not apply if (1) the applicant would at the time of filing for husband's insurance benefits, meet the requirements for entitlement to those benefits as they were in effect in January 1977, and (2) the applicant is receiving, or eligible to receive, a government pension for any month in the period December 1977 through November 1982.

In order to meet the requirements for husband's insurance benefits as they were in effect in January 1977, an individual must have been receiving one-half support from his wife at the beginning of her period of disability or at the time she became entitled to retirement insurance benefits.

Mr. Mathews has stated that he retired from the Postal Service effective November 18, 1977, and was awarded a Civil Service retirement annuity in the amount of \$573.00 per month. He has further stated that he was not receiving at least one-half of his support from his wife at the time she became entitled to retirement or disability insurance benefits.

Since Mr. Mathews did not meet the dependency requirements in the law in effect in January 1977, the government pension offset must be applied on a dollar-for-dollar basis against the amount of his husband's insurance benefits beginning January 1978. Since his pension exceeds the amount of his husband's insurance benefits, nothing is payable to Mr. Mathews on his wife's social security record.

Mr. Mathews has submitted some material from various sources concerning the government pension offset. The article written by the district manager of the Social Security Office in Nashville, Tennessee, was correct in advising Mr. Mathews that for the government pension offset exception to apply, a husband must meet the requirementrs in effect in January 1977. The other publications were misleading at best.

After a careful review of all the facts, we find upon reconsideration that the government pension offset was properly applied in January 1978 and thereafter to husband's insurance benefits otherwise payable to Mr. Mathews. This affirms our initial determination.

Chief, Reconsideration Branch

April 24, 1979 Date

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

CIVIL ACTION NO. 79-G-5251-NE

Filed August 24, 1982

Entered August 25, 1982

ROBERT H. MATHEWS AND MARY M. MATHEWS, AND OTHERS SIMILARLY SITUATED, PLAINTIFFS,

23

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

ORDER

This cause is before the court upon the motion for declaratory judgment filed by plaintiff Robert H. Mathews individually and on behalf of the class he represents. Having considered the motion, pleadings, submissions of counsel, and applicable law, the court is of the opinion that Section 334(g)(1)(B) of the Social Security Amendments of 1977, P.L. 95-216, denies Mr. Mathews and the class he represents the equal protection of the laws guaranteed through the due process clause of the fifth amendment. The court is further of the opinion that Section 334(g)(3) of the Social Security Amendments of 1977, P.L. 95-216, is an unconstitutional usurpation of judicial power by the legislative branch. Accordingly, it is

ORDERED, ADJUDGED, DECREED and DE-CLARED that Section 334(g)(1)(B) and Section 334(g)(3) of the Social Security Amendments of 1977,

P.L. 95-216, are unconstitutional. It is

FURTHER ORDERED that the defendant immediately pay to Mr. Mathews and the members of the class he represents those benefits they would have received

had it not been for the operation of Section 334(g)(1)(B); and it is

FURTHER ORDERED that the defendant immediately undertake to identify and notify all members of the class of this decision and order. The defendant shall, within 60 days, submit for the court's approval a plan for identifying and notifying the class members. The plaintiff may file objections to the proposed plan within 10 days of its filing with the court. The court retains jurisdiction for the purpose of implementing this order.

A separate opinion is being entered contemporaneously herewith.

DONE and ORDERED this 24th day of August 1982. /s/ J. Foy Guin, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

CIVIL ACTION NO. 79-G-5251-NE

Filed: September 21, 1982

ROBERT H. MATHEWS AND MARY M. MATHEWS, AND OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES

Notice is hereby given this 21st day of September, 1982, that Defendant Richard Schweiker, Secretary, Department of Health and Human Services, hereby appeals to the Supreme Court of the United States from the Order and Memorandum Opinion of this Court in the above-styled action filed on the 24th day of August, 1982, and entered on the 25th day of August, 1982. This appeal is taken pursuant to Title 28, United States Code, Sections 1252 and 2101.

By his attorney,

FRANK W. DONALDSON United States Attorney

HERBERT J. LEWIS, III

Assistant United States Attorney

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

 The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Section 202(c) of the Social Security Act, 42 U.S.C. (Supp. IV) 402(c), provides in pertinent part:

(1) The husband (as defined in section [216(f)] of this title) of an individual entitled to old-age or disability insurance benefits, if such husband—

(A) has filed application for husband's insurance

benefits,

(B) has attained age 62, and

(C) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife,

shall be entitled to a husband's insurance benefit for each month, beginning with the first month after August 1950 in which he becomes so entitled to such insurance benefits and ending with the month preceding the month in which any of the following occurs: he dies, his wife dies, they are divorced, he becomes entitled to an old-age or disability insurance benefit based on a primary insurance amount which is equal to or exceeds one-half of the primary insurance amount of his wife, or his wife is not entitled to disability insurance benefits and is not entitled to the old-age insurance benefits.

(2)(A) The amount of a husband's insurance benefit for each month as determined after application of the provisions of subsections (q) and (k) of this

section shall be reduced (but not below zero) by an amount equal to the amount of any monthly periodic benefit payable to such husband for such month which is based upon his earnings while in the service of the Federal Government or any State (or political subdivision thereof, as defined in section [218 (b)(2)] of this title) if, on the last day he was employed by such entity, such service did not constitute "employment" as defined in section [210] of this title.

3. Former Section 202(c) of the Social Security Act, 42 U.S.C. 402(c), provides in pertinent part:

(1) The husband (as defined in section [216(f)] of this title) of an individual entitled to old-age or disability insurance benefits, if such husband—

(A) has filed application for husband's insurance

benefits,

(B) has attained age 62,

(C) was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from such individual—

(i) if she had a period of disability which did not end prior to the month in which she became entitled to old-age or disability insurance benefits, at the beginning of such period or at the time she became entitled to such benefits, or

(ii) if she did not have such a period of disability, at the time she became entitled to such benefits,

and filed proof of such support within two years after the month in which she filed application with respect to such period of disability or after the month in which she became entitled to such benefits, as the case may be, or, if she did not have such a period, two years after the month in which she became entitled to such benefits, and

(D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife,

shall be entitled to a husband's insurance benefit for each month, beginning with the first month after August 1950 in which he becomes so entitled to such insurance benefits and ending with the month preceding the month in which any of the following occurs: he dies, his wife dies, they are divorced, he becomes entitled to an old-age or disability insurance benefit based on a primary insurance amount which is equal to or exceeds one-half of the primary insurance amount of his wife, or his wife is not entitled to disability insurance benefits and is not entitled to old-age insurance benefits.

4. Section 334(g) of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1546, 42 U.S.C. (Supp. IV) 402 note provides:

(1) The amendments made by the preceding provisions of this section [section 334 of Pub. L. 95-216] shall not apply with respect to any monthly insurance benefit payable, under subsection (b), (c), (e), (f), or (g) (as the case may be) of section 202 of the Social Security Act, to an individual—

(A) to whom there is payable for any month within the 60-month period beginning with the month in which this Act is enacted (or who is eligible in any such month for) a monthly periodic benefit (within the meaning of such provisions) based upon such individual's earnings while in the service of the Federal Government or any State (or political subdivision thereof, as defined in section 218(b)(2) of the Social Security Act); and

(B) who at time of application for or initial entitlement to such monthly insurance benefit under such subsection (b), (c), (e), (f), or (g) meets the requirements of that subsection as it was in effect and being administrated in Language 1077

fect and being administered in January 1977.

(2) For purposes of paragraph (1)(A), an individual is eligible for a monthly periodic benefit for any month if such benefit would be payable to such individual for that month if such individual were not employed during that month and had made proper

application for such benefit.

(3) If any provision of this subsection, or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid.

5. Section 202(j)(2) of the Social Security Act, 42 U.S.C. (Supp. IV) 402 (j)(2), as amended by Section 306(a), Pub. L. No. 96-265, 94 Stat. 457, provides in

pertinent part:

(2) An application for any monthly benefits under this section filed before the first month in which the applicant satisfies the requirements for such benefits shall be deemed a valid application (and shall be deemed to have been filed in such first month) only if the applicant satisfies the requirements for such benefits before the Secretary makes a final decision on the application and no request under section [205(b)] of this title for notice and opportunity for a hearing thereon is made or, if such a request is made, before a decision based upon the evidence adduced at the hearing is made (regardless of whether such decision becomes the final decision of the Secretary).

6. Section 204(b) of the Social Security Act, 42 U.S.C. 404(b), provides in pertinent part:

In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this [title] or would be against equity and good conscience.

- 7. Section 334(f) of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1546, 42 U.S.C. (Supp. IV) 402 note provides:
 - (f) The amendments made by this section [Section 334 of P.L. 95-216] shall apply with respect to monthly insurance benefits payable under title II of the Social Security Act for months beginning with the month in which this Act is enacted, on the basis of applications filed in or after the month in which this Act is enacted.

No. 82-1050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. Appellant,

> ROBERT H. MATHEWS, Et Al, Appellees.

On Appeal from the United States District Court For the Northern District of Alabama

MOTION TO AFFIRM

ROBERT W. BUNCH
JOHN R. BENN
PECK, SLUSHER & BUNCH
118 West Dr. Hicks Boulevard
Florence, Alabama 35630
(205) 766-4490

BRUCE K. MILLER
Western New England CollegeSchool of Law
Springfield, Massachusetts 01119
(413) 782-3111

QUESTIONS PRESENTED

- 1. Whether the exception clause of the government pension offset provision which incorporates by reference the gender-based dependency requirement previously held unconstitutional by this Court's decision in Califano v. Goldfarb: A) should be interpreted without reference to that requirement, or, if not, B) violates the equal protection component of the Due Process Clause of the Fifth Amendment.
- Whether a severability clause which precludes all persons harmed by an unconstitutional statutory classification from securing judicial relief is an unconstitutional obstruction of the exercise of judicial review.

TABLE OF CONTENTS

	Page
Questions Presented	i
Motion to Affirm	a . 1
Constitutional Provision Involved	*1
Legislative Provisions Involved	2
Opinion Below	2
Statement of the Case	2
The Questions Are Not Substantial	6
Appendix A	A-1
Appendix B	A-3
Appendix C	A-6
TABLE OF AUTHORITIES	
Cases:	
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)	15
Califano v. Goldfarb, 430 U.S. 199 (1977) 3,7,11	,13,14
Califano v. Silbowitz, 430 U.S. 924 (1977)	5,14
Califano v. Westcott, 443 U.S. 76 (1979)	14
Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932)	15
Davis v. Passman, 442 U.S. 228 (1979)	15
Electric Bond & Share Co. v. Securities and Exchange Commission, 303 U.S. 419 (1938)	15

Gebbie v. United States R. R. Retirement Board, 631 F.2d 512 (7th Cir. 1980)	10
Goldfarb v. Secretary of Health, Education and Welfare, 396 F. Supp. 308 (E.D. N.Y. 1975)	13
Hecht v. Malley, 265 U.S. 144 (1924)	10
lowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931)	15
Jablon v. Califano, 430 U.S. 924 (1977)	5,14
Jablon v. Secretary of Health, Education and Welfare, 399 F. Supp. 118 (D. Md. 1975)	13
Kirchberg v. Feenstra, 450 U.S. 455 (1981)	12
Marsh v. Buck, 313 U.S. 406 (1941)	15
Mississippi University for Women v. Hogan, U.S, 102 S. Ct. 333 (1982)	12
Richardson v. Griffin, 409 U.S. 1069 (1972)	14
Rosofsky v. Schweiker, 523 F. Supp. 2292 (E.D. N.Y. 1981)	14
Shapiro v. United States, 335 U.S. 1 (1948)	10
Sherbert v. Verner, 374 U.S. 398 (1963)	16
Silbowitz v. Secretary of Health, Education and Welfare, 397 F. Supp. 862 (S.D. Fla. 1975)	13
Thomas v. Review Bd. Ind. Empl. Sec. Div., 450 U.S. 707 (1981)	16
United States v. Batchelder, 442 U.S. 114, 122 (1979)	7
United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973)	14
	1.4

United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980)	12
Valley Forge College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982)	16
Wachtell v. Schweiker, No. 80-8022-Civ. ALH (S.D. Fla., Jan. 26, 1982)	11
Webb v. Harris, 509 F. Supp. 1091 (N.D. Cal. 1981)	11
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)	14
Wright v. Califano, 603 F.2d 666 (7th Cir. 1979), cert. denied, 447 U.S. 911 (1980)	10
Constitution and Statutes:	
United States Constitution, Fifth Amendment (Due Process Clause)	1
Railroad Retirement Act of 1974, 45 U.S.C. (& Supp. IV)	10
Social Security Act, 42 U.S.C. (& Supp. IV) 301 et seq	3
Section 202(c), 42 U.S.C. 402(c)	3,5
Section 202(k)(3)(A), 42 U.S.C. 402(k)(3)(A)	3
Section 202(f), 42 U.S.C. 402(f)	5
Section 202(c)(1)(C), 42 U.S.C. 402(c)(1)(C)	8
Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509.	4
Section 334(g)(1)(B), 42 U.S.C. (Supp. IV) 402 note	4.7
Virgin Islands Tax Bill, Pub. L. No. 97-455	6

Miscellaneous:

J. Bondar, "Initial Effect of Elimination of the Depen- dency Requirement on Entitlement to Husbands'	
and Widowers' Benefits," Research and Statistics Note No. 2, Social Security Administration, Office of Research and Statistics, (June 28, 1982)	13
H.R.Conf. Rep. No. 95-837, 95th Cong., 1st Sess. (1977)	8
House Comm. on Ways and Means, 95th Cong., 1st Sess., Summary of the Conference Agreement on H.R. 9346 - The Social Security Amendments of 1977 (Comm. Print 1977)	9
Joint Explanatory Statement of the Committee of Con- ference on H.R. 7092, Congressional Record (Dec. 21, 1982)	6
Reply Brief for Appellant, Wachtell v. Schweiker, Appeal No. 82-5552 (11th Cir.)	13
S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. (1977) .	. 8
Social Security Claims Manual Transmittal No. 3844 (July 1976)	9

No. 82-1050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES. Appellant,

ROBERT H. MATHEWS. Et Al. Appellees.

On Appeal from the United States District Court For the Northern District of Alabama

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the district court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall...be deprived of life, liberty, or property, without due process of law; now shall private property be taken for public use, without just compensation.

LEGISLATIVE PROVISIONS INVOLVED

Section 334 of Public Law 95-216 provides for the nonapplicability of the 1977 Amendments as follows:

The amendments...shall not apply to an individual...who at the time of application for initial entitlement to such monthly (b), (c), (e), (f), or (g) meets the requirements of that subsection as it was in effect and being administered in January, 1977.

The severability clause of Section 334 of Public Law 95-216 provides in pertinent part:

If any provision of this subsection, or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid.

OPINIONS BELOW

The opinion of the district court is not reported here, but is set out in Appellant's Jurisdictional Statement, Appendix A.

STATEMENT OF THE CASE

Appellee is a 67 year old white male who retired in November, 1977, from his job with the Post Office. He has never been an insured individual under the Social Security Act and has never received old age, survivor or disability benefits under the Act. His wife, Mary, worked as an employee of a local bank in Cullman, Alabama for thirty-five years. She was a fully insured individual under the Social Security Act at the time of her retirement in June, 1977.

In December of 1977, Mr. Mathews filed an application for husband's insurance benefits based on his wife's earnings

records. Prior to his retirement in November, 1977, the Appellee inquired as as to whether he would be eligible for spousal benefits. He was advised that as a result of this Court's decision in Califano v. Goldfarb, 430 U.S. 199 (1977) that he would be entitled to receive benefits under Section 202(c) of the Social Security Act, 42 U.S.C. § 402(c), notwithstanding his receipt of a government pension.

Prior to the Goldfarb decision, benefits to male spouses of deceased, retired, or disabled workers who were covered under the provisions of the Social Security Act were paid according to a gender-based dependency test. Wives automatically received spousal benefits, subject to the dual entitlement rules.2 Husbands, on the other hand, in order to receive spousal benefits, had to meet a gender-based dependency test. This dependency test required proof that they received at least onehalf of their support from covered wives. If the dependency criteria were met, these benefits were also subject to the dual entitlement rules. Female spouses who were not themselves entitled to Social Security benefits because they worked in government employment, however, were still eligible for spousal benefits. This meant that female spouses who were government employees automatically received spousal benefits on the earnings record of their covered husbands, while husbands who were government employees had to satisfy the one-half support test in order to be eligible for spousal benefits. This resulted in the earnings record of covered female employees providing less protection for their families than similarly situated male employees.

Mr. Mathews filed his application for spousal benefits thirty days before his 62nd birthday—January 13, 1978. 42 U.S.C. 402 (c) requires that the husband be at least age 62 before being eligible for spousal benefits.

⁴² U.S.C. 402(k)(3)(A) reduces the amount of spousal benefits by any amount an individual is entitled to receive based on his or her own earnings record.

The gender-based dependency test was examined in Goldfarb and declared invalid by the Court as violative of the equal protection component of the Fifth Amendment,3 Husbands like Mr. Mathews were now entitled to spousal benefits automatically. without proof of dependency, as were wives before the Goldfarb decision, subject only to the dual entitlement rules. Additionally, after Goldfarb it became possible for government employed husbands to receive spousal benefits, as well as government-employed wives, without any offset based upon their own government pensions. The practical effect of the Goldfarb decision extending benefits without need of demonstrating dependency was to entitle Mr. Mathews to receive dependency was to entitle Mr. Mathews to receive spousal benefits on his wife's earnings record on both the date of his retirement decision and the December 15, 1977 date of his application for benefits.

Mr. Mathews filed his application for spousal benefits at a time in which he did not have to demonstrate dependency. The Social Security Administration advised him on March 23, 1978, that in accordance with the provisions of the Social Security Amendments of 19774 his non-dependency would result in his monthly spousal benefit being offset dollar-for-dollar by the amount of his government pension. Mr. Mathews was notified

³ The Court invalidated the dependency requirement in Public Law No. 95-216, 91 Stat. 1509.

Section 334(g)(1)(B) of Public Law No. 95-216.

^{&#}x27;Mr. Mathews on the date of his application for spousal benefits was receiving a civil service pension of \$573.00 per month. The Social Security Administration determined that he would be entitled to receive \$153.20 in spousal benefits. Since the amount of his government pension exceeded the amount of his entitlement to spousal benefit, the latter was reduced to zero.

that this determination was made in accordance with Section 334 of Public Law 95-216. This section, known as the government pension offset provision, was enacted in December of 1977 as an amendment to the husband's insurance benefits section of the Social Security Amendments of 1977. It was not contained in the 1977 Carter Administration's proposals to remedy the Social Security trust fund's financial problems nor in the proposal passed by the House. The government pension offset provision first appeared in a Senate-enacted proposal which, similar in effect to the dual entitlement rules, reduced the amount of spousal benefits a government worker would be entitled to by the amount of his or her government pension.

Because of the discrepancy between the Senate proposal and the bill passed by the House, the matter was referred to a Conference Committee. An agreement was reached which accepted in principle the Senate's pension effect provision but added for the first time an exception clause postponing the effective date of the government pension offset until after December, 1982. The eligibility for the exception clause was open to all individuals who would have been eligible for full spousal benefits under the Social Security Act "as it was in effect and being administered in January, 1977."

The Social Security Administration interpreted the exception clause as reinstating, for a period of five years, the very same gender-based dependency test which had previously been held unconstitutional in *Goldfarb*. Because Mr. Mathews could not

^{*} Nothing is apparent in the legislative history of the exception clause as to why the January, 1977 date was selected.

⁷ Califano v. Goldfarb struck down the dependency requirement found in 42 U.S.C. 402(f) (1976). Approximately three weeks after the Goldfarb decision, the Court summarily affirmed two district court decisions striking down the one-half support requirement applicable to husband's benefits. Califano v. Silbowitz, 430 U.S. 924 (1977); Jablon v. Califano, 430 U.S. 924 (1977). Mr. Mathews' application was for husbands' benefits under 42 U.S.C. 402(c).

satisfy the dependency criteria to qualify for the exception clause, he was notified that he could receive no spousal benefits from Social Security. It is undisputed that, had the gender of the Mathews been reversed, Mrs. Mathews' application as a non-dependent spouse would have been granted.

Recognizing the apparent problems of attempting to reinstate the gender-based dependency criteria and facing the December, 1982 expiration of the exception clause, Congress agreed on December 21, 1982 to amend the exception clause eligibility criteria. The new provision enacted in Public Law 97-455' states that the government pension offset does not apply to an individual who becomes eligible for a government pension prior to July, 1983, if that individual can satisfy the dependency requirement. Unlike the gender-based dependency test administratively applied by the Social Security Administration in determining eligibility for the exception clause effective for the years 1977-1982, the new provision requires the dependency test to apply to both men and women. No longer is there a gender-based dependency test applicable to only male spouses.

THE QUESTIONS ARE NOT SUBSTANTIAL

1. The first question rests upon the statutory construction of the criteria for qualifying for the exception clause to the government pension offset provision. Appellee's threshold thesis is that Congress intended the exception clause to protect the reliance interests of soon to retire men and women without reference to a gender-based dependency test. Hence, the qualifying criteria for the exception clause should be interpreted as

H.R. 7092, passed by Congress on December 21, 1982, was signed into law by President Reagan on January 12, 1983. The amendments to the Social Security Act appear in Section 7 of the Virgin Island Tax Bill. The text of the amendments is fully set forth in Appendix A. The Joint Explanatory Statement of the Conference Committee is set forth in Appendix B.

non-gender specific notwithstanding the Social Security Administration's incorporation of a gender-based dependency test. Simply stated, the exception clause should be construed as applicable to both male and female spouses without any reference to a gender-based dependency test—an interpretation that would entitle Mr. Mathews to receive spousal benefits.

If, on the other hand, the Court resolves the threshold question by concluding that Congress intended to incorporate by reference the gender-based dependency test as the standard for qualification under the exception clause, then the dependency requirement should clearly be held to violate equal protection constraints. This should be an obvious conclusion because the gender-based dependency requirement incorporated by reference into the exception clause is the very one struck down in Califano v. Goldfarb, 430 U.S. 199 (1977). If the Appellee's position on the threshold thesis is correct, then there is no occasion to reach the equal protection issue.

A. The cardinal principle of statutory construction is for the Court to construe the exception clause in a manner to avoid a constitutional issue if such construction is "fairly possible" from the language of the statute. United States v. Batchelder, 442 U.S. 114, 122 (1979). To resolve Appellee's threshold issue the Court must first examine the language of the exception clause. Nowhere in the statute is there specific mention of the

^{*} The severability issue also would not need to be addressed.

rovides that the government pension offset provision does not apply to any individual who meets the requirements for spousal benefits "as in effect and being administered in January 1977." The Social Security Administration has construed this language to require male spouses to demonstrate that they receive at least one-half of their support from their spouses before being eligible for spousal benefits. Female spouses need not establish dependency in order to be eligible for the exception clause.

gender-based dependency test utilized to deny Mr. Mathews spousal benefits.¹¹ Not only is the statute facially non-gender specific but the legislative history reveals that Congress intended the exception clause to apply to individuals who were close to retirement. Congress therefore created a non-gender specific class entitled to benefit from the legislation. Support for the non-gender specific approach was evidenced by the particular problems facing women as a component of this class.¹² There is

The House recedes with an amendment which would provide for an exception for certain people who are already receiving pensions based on non-covered public employment (or who would be eligible for such pension within 5 years of the month of enactment) and who could have expected to receive social security benefits as dependents or survivors under the social security law as in effect on January 1, 1977. The managers are concerned that there may be large num! ers of women, especially widows in their late fifties, who are already drawing pensions, or would be eligible to draw them within 5 years of the date of enactment of this bill, based on their non-covered work and whose retirement income was planned for on the assumption of the availability of full wife's and widow's benefits under social security. Inclusions of this exception to the applicability of the Senate provision, reinforces its prospective nature and avoids penalizing people who are already retired or close to retirement from public employment and who cannot be expected to readjust their retirement plans to take account of the "offset" provision that will apply in the future.

H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 71-72 (1977); S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. 71-72 (1977). The Summary of the Conference Agreement printed by the House Ways and Means Committee is entirely non-gender specific in referring to the exception clause. It provides:

Prior to the Goldfarb decision male spouses were entitled to benefits only if they could fulfill the dependency requirement. 42 U.S.C. 402(c)(1)(C) (1976) (former provision).

¹³ The only legislative history for the exception clause if found in the Senate and House Conference Reports and a Committee Print of the House Ways & Means Committee. The Senate and House Conference Reports are identical in language and provide the following explanation for the exception clause:

nothing apparent in the legislative history or the statute itself to justify the construction utilized by the Social Security Administration to resurrect an unconstitutional dependency test.

Several other arguments mandate the same conclusion. A comparison of the exception clause language "as being administered in January, 1977" with the then current Social Security Claims Manual reveals that the Social Security Administration was "administering" the questioned gender-based dependency test by deferring any decision-making until this Court made its decision in *Goldfarb*. Social Security Claims Manual Transmittal No. 3844 (July 1976). Since this Court

The measure contains an exception under which the offset provision would not apply to people who were receiving or will be eligible to receive a public pension within 5 years after enactment. This is to protect those persons who were expecting a social security dependency benefit based on their pouse's record but were not receiving it because of their age or the fact that their spouses were not yet receiving benefits.

House Comm. on Ways and Means, 95th Cong., 1st Sess., Summary of the Conference Agreement on H.R. 9346 - The Social Security Amendments of 1977 (Comm. Print 1977).

¹³ The Social Security Claims Manual required the reviewing office to send the following letter to a non-dependent male claimant filing an application for spousal benefits:

The current law requires that claimants for (widower's) (husband's) benefits meet a one-half support requirement. Some Federal district courts have ruled that this requirement is unconstitutional; however, the Secretary of Health, Education and Welfare has appealed these rulings. On February 23, 1976, the U.S. Supreme Court noted probable jurisdiction of the case of Goldfarb v. Secretary, HEW (#75-699), but we do not expect the Court to hear the case until the fall of 1976. In the meantime, the law remains unchanged and no payment can be made until a final decision has been rendered on the constitutionality of the one-half support requirement. Even though no payment may currently be made, your claim is being recorded and your rights are being protected. You will be notified of your entitlement or nonentitlement to benefits once the issue is finally resolved.

Social Security Claims Manual Transmittal No. 3844 (July 14, 1976).

struck down the gender-based dependency requirement on March 2, 1977, entitlement to spousal benefits without need of demonstrating dependency was clearly the manner in which the statute was being "administered" in January, 1977. Again, it is obvious that the gender-based dependency test was never meant to be incorporated into the exception clause.

Perhaps the most persuasive statutory construction approach is to interpret the exception clause in light of the Goldfarb decision eliminating the gender-based dependency clause. There should be no question that Congress was aware of this decision when it enacted the government pension offset provision and the accompanying exception clause. The fact that Congress passed these provisions after the Goldfarb decision raises the presumption that Congress was adopting the construction of entitlement to spousal benefits pronounced by this Court—that dependency was no longer required. Shapiro v. United States, 335 U.S. 1 (1948); Hecht v. Malley, 265 U.S. 144 (1924). The Seventh Circuit in Gebbie v. United States R. R. Retirement Board, 631 F.2d 512 (7th Cir. 1980) reached a similar conclusion is determining that reference in the Railroad Retirement Act of 1974 to certain provisions in the Social Security Act "as in effect on December 31, 1974" should be interpreted without reference to the dependency which was struck down in Goldfarb.11 In

The Social Security Administration neither approved nor denied non-dependent male applications for spousal benefits for the period July, 1976 to March, 1977. Ostensibly, all applications for benefits for this period were granted after this Court's decision in Goldfarb. It is interesting to note that retroactive benefits to male spouses whose applications for benefits were denied due to lack of dependency has been upheld even dating back as early as October 5, 1973. See Wright v. Califano, 603 F.2d 666 (7th Cir. 1979), cert. denied, 447 U.S. 911 (1980).

¹³ The Seventh Circuit held that "[i]t is difficult for the [Railroad Retirement] Board to take the position that Congress intended this language to have the extraordinary effect of insulating the Social Security component of Railroad Retirement benefits against the 'change' brought about by Goldfarb." 631 F.2d at 516.

discussing the exception clause of the Social Security Amendments of 1977, two district courts have reached the same conclusion. Wachtell v. Schweiker, No. 80-8022-Civ. ALH (S.D. Fla., Jan. 26, 1982), (the full text of the decision is set forth in Appendix C), and Webb v. Harris, 509 F. Supp. 1091 (N.D. Cal. 1981).

Any of the above approaches would require that the genderbased dependency test not be incorporated into the eligibility criteria for the exception clause. The result would be to entitle Mr. Mathews to spousal benefits without proof of dependency. As the statutory construction issue leads to this obvious conclusion, the Court is certainly justified in summarily affirming the district court decision on this basis.

B. If, in the alternative, the exception clause does incorporate the gender-based dependency requirement, then the Court should easily conclude that such a requirement violates the equal protection component of the Fifth Amendment. After all, this is the same dependency clause held unconstitutional in Califano v. Goldfarb, 430 U.S. 199 (1977). 16

Appellee notes that the Secretary has advanced only one justification for the dependency requirement—the protection of reliance interest. The Secretary intimates that since the gender-based dependency requirement incorporated into the exception

[&]quot;Appellee queries the situation confronting Leon Goldfarb if Appellant's argument is accepted. Mr. Goldfarb's receipt of spousal benefits after December, 1977 would face the same problem as Mr. Mathews in that both are retired non-dependent federal employees. 430 U.S. 199, 203. The Court's ruling in Goldfarb would seem of dubious value in that not more than nine months after the decision the Social Security Administration was applying the same gender-based dependency requirement to deny Mr. Goldfarb spousal benefits. It appears that the same constitutional infirmities present in the gender-based dependency requirement are applicable again and would be utilized to deny Mr. Goldfarb spousal benefits.

clause serves to protect reliance interests, such a provision is immunized from equal protection examination. This approach seeks to lay aside the judicial standards of equal protection applicable to gender-based classifications in favor of a more lenient equal protection standard applicable to social and economic benefits. The fallacy of this approach is that it fails to honestly recognize that a gender-based classification is present and that in order to withstand constitutional challenge, there must be an "exceedingly persuasive justification for the classification." Mississippi University for Women v. Hogan, ____ U.S. ____, 102 S. Ct. 333 (1982). The explanation tendered by the Secretary in the Jurisdictional Statement is woefully inadequate in satisfying this responsibility.

The Secretary theorizes that in making retirement decisions only women and dependent men could have relied upon their entitlement to spousal benefits. The inadequacy of this theory is that it fails to account for at least two identifiable classes of non-dependent males who relied on their entitlement to spousal benefits. The first class is comprised of non-dependent males vindicating their entitlement to spousal benefits prior to the

[&]quot;The Government supports its position by reference to United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980). A close examination of Justice Rehnquist's decision in Fritz, however, indicates that "suspect" classifications and their accompanying judicial standards of review were not involved in the Court's decision making. Id. at 174.

Government to demonstrate an "exceedingly persuasive justification" for incorporating the gender-based dependency requirement. Kirchberg v. Feenstra, 450 U.S. 455, (1981).

Goldfarb decision. The second and perhaps more significant class consists of the 29,026 males claiming entitlement to spousal benefits after the Goldfarb decision but prior to the effective date of the Social Security Amendments of 1977. Clearly, the reliance of this class (of which Mr. Mathews was a member) to unreduced spousal benefits is no less existent simply because the Secretary ignores the actuality of the class. Perhaps this explains why the Secretary has referred to the reliance interest in a quantum measurement.

If protection of reliance interest is the keystone of the legislation, then equal protection requires that the reliance interests of non-dependent men also be protected. The Government cannot

[&]quot;Judicial authority entitling non-dependent men to spousal benefits was apparent in several district court jurisdictions as early as 1975. Goldfarb v. Secretary of Health, Education and Welfare, 396 F. Supp. 308 (E.D. N.Y. 1975); Jablon v. Secretary of Health, Education and Welfare, 399 F. Supp. 118 (D. Md. 1975); Silbowitz v. Secretary of Health, Education and Welfare, 397 F. Supp. 862 (S.D. Fla. 1975). Although these cases were not class actions they still served as signals to non-dependent males that they would be entitled to spousal benefits.

J. Bondar, "Initial Effect of Elimination of the Dependency Requirement on Entitlement to Husbands' and Widowers' Benefits", Research and Statistics Note No. 2, Social Security Administration, Office of Research and Statistics, June 28, 1982, table 1.

Reply Brief for Appellant, at 2, Wachtell v. Schweiker, Appeal No. 82-5552 (11th Cir.) In its Reply Brief, the Secretary wrote "the Wachtells and other families that became entitled to benefits only after the decision in Califano v. Goldfarb, 430 U.S. 199 (1977), never expected to receive the extra money until March of 1977, and its loss in December of 1977 would have upset few if any of their plans in a significant way." (emphasis added) Id. This is an overly simplistic view. In most cases, once a non-dependent male retires he loses the option of returning to gainful employment even though he learns some months later that spousal benefits will be terminated. Most retirement decisions made prior to the effective date of the Social Security Amendments of 1977 are irreversible. In this fashion, the retirement decisions of non-dependent males are equally significant in their impact on the individual.

simply wish away Mr. Mathews' retirement decision being made at a time in which he was eligible for unreduced spousal benefits. As the sole justification for the incorporation of the gender-based dependency requirement vests singularly on the protection of reliance interests, it should summarily fail the equal protection analysis because it does not recognize the reliance interests of the non-dependent male.

2. Assuming that the qualifying criteria applicable to the exception clause violates equal protection, the Court must next resolve the problem of the statute's underinclusiveness. In analyzing this issue, the Court has previously held that the remedy for an equal protection violation is to extend the benefits of the statute to the excluded class.²² Application of the extension doctrine would allow Mr. Mathews to qualify under the exception clause without demonstrating dependency. The Secretary, in response, contends that the severability clause contained in the government pension offset forecloses extension of benefits to the excluded class and dictates that the entire exception clause be voided.²³ The Secretary's approach to the prob-

The extension of benefits to the excluded class has been the rule rather than the exception. See Califano v. Westcott, 443 U.S. 76 (1979); Califano v. Silbowitz, 430 U.S. 924 (1977); Jablon v. Califano, 430 U.S. 924 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); United States Depter of Agriculture v. Moreno, 413 U.S. 528 (1973); Richardson v. Griffin, 409 U.S. 1069 (1972).

Died, the Secretary has failed to implement its clear mandate by continuing to recognize the exception clause in determining entitlement to spousal benefits. If the severability provision is valid then the Secretary should have implemented its directives in 1981 when the exception clause was first held invalid. Rosofsky v. Schweiker, 523 F. Supp. 2292 (E.D. N.Y. 1981). The Secretary's position produces the curious result that no individual receiving a government pension who retired between 1977 and 1982 can claim an exemption from the government pension offset. Dependent government employees who retire from January, 1983 through July, 1983, however, can claim an exemption by virtue of Section 7 of Public Law 97-455. Surely, this interpretation is completely contrary to the intent of the exception clause.

lem of the statute's underinclusiveness is only justified if the severability clause itself does not represent interference with the judicial function.

The resolution of this question should begin with the understanding that the severability clause of the government pension offset is not in the nature of a traditional provision. The traditional severability clause recognized by the Court provides that if a portion of a statute has been stricken as invalid, the remainder is self-sustaining and capable of enforcement without regard to the stricken portion. The Court on many occasions has affirmed the validity of this type of severability clause.14 But the Court has never honored a severability clause which purports in advance of litigation challenging the constitutionality of the statute to preclude a federal court from awarding figble relief to individuals whose constitutional rights are violated. By contrast, the severability clause of the government pension offset is an "inverse" provision. Specifically, it seeks to invalidate the entire statute if any individual provision is held invalid. The effect of the severability clause in question is to suppress judicial review and to allow the legislature to arrogate judicial review of the statute. If accepted by the Court, Mr. Mathews will be without a remedy despite a clear equal protection violation.

The Court has consistently held that any person whose rights under the Constitution are violated is entitled to an adequate remedy for the violation. Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931). Contrary to the

³⁴ The "traditional" severability was recognized in Marsh v. Buck, 313 U.S. 406 (1941); Electric Bond & Share Co. v. Securities and Exchange Commission, 303 U.S. 419 (1938); Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932).

position of the Secretary, affording Mr. Mathews nothing more than the dubious satisfaction of seeing wives and dependent husbands ose their Social Security benefits (the result mandated by the severability clause) is to provide him with no relief whatever from the equal protection violation. The injury Mr. Mathews suffers by virtue of incorporation of the gender-based dependency requirement is not merely the abstract wrong of unequal treatment; it is the tangible loss of statutory benefits to which he is entitled. Thomas v. Review Bd. Ind. Empl. Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963). The claim of a tangible loss (as opposed to the abstract interest in equality) rises to the level of a controversy which a federal court is empowered by Article III of the Constitution to decide. Valley Forge College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).

The legislature has impermissibly impeded the federal courts from redressing a constitution violation by precluding the award of benefits and failing to afford any alternative remedy to the excluded class. The district court in analyzing this question properly invalidated the severability clause contained in the government pension offset provision.



CONCLUSION

For the foregoing reasons it is respectfully submitted that the Appellant has presented no substantial question for the decision of this Court, and that the judgment and decree of the district court should be affirmed.

Respectfully submitted,

ROBERT W. BUNCH JOHN R. BENN 118 West Dr. Hicks Boulevard Florence, Alabama 35630

BRUCE MILLER
Western New England College
School of Law
Springfield, Massachusetts 01119
Counsel for Appellees

February 17, 1983

CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion to affirm has been served on the Solicitor General by mailing an appropriate number of copies of said motion to him, postage prepaid and properly addressed.

This the 17th day of February, 1983.

JOHN R. BENN Of Counsel for Appellees

APPENDIX

APPENDIX A

VIRGIN ISLAND TAX BILL PUBLIC LAW 97-455

Sec. 7. Offset Against Spouses' Benefits On Account Of Public Pensions

(a) ADDITIONAL EXEMPTION.—

- (1) Section 334 of the Social Security Amendments of 1977 (Public Law 95-216) is amended by adding at the end thereof the following new subsection:
- (h) In addition, the amendments made by the preceding provisions of this section shall not apply with respect to any monthly insurance benefit payable, under subsection (b), (c), (e), (f), or (g) (as the case may be) of section 202 of the Social Security Act, to an individual—
- (1) to whom there is payable for any month prior to July 1983 (or who is eligible in any such month for) a monthly periodic benefit (within the meaning of such provisions) based upon such individual's earnings while in the service of the Federal Government or any State (or political subdivision thereof, as defined in section 218(b)(2) of the Social Security Act); and
- (2) who at the time of application for or initial entitlement to such monthly insurance benefit under such subsection (b), (c), (e), (f), or (g)—
- (A) meets the dependency test of one-half support set forth in paragraph (1)(C) of such subsection (c) as it read prior to the enactment of the amendments made by this section, or an equivalent dependency test (if the individual is a woman), in the case of an individual applying for or becoming entitled to benefits under such subsection (b) or (c), or

- (B) meets the dependency test of one-half support set forth in paragraph (1)(D) of such subsection (f) as it read prior to the enactment of the amendments made by this section or an equivalent dependency test (if the individual is a woman), in the case of an individual applying for or becoming entitled to benefits under such subsection (c), (f), or (g).
- (2) Section 334(f) of such Act is amended by striking out "The amendments" and inserting in lieu thereof "Subject to subsections (g) and (h), the amendments".
- (b) REPORT BY SECRETARY.—The Secretary of Health and Human Services shall conduct a study of the provisions of title II of the Social Security Act which require an offset against spouses' and surviving spouses' benefits on account of public pensions, as added by section 334 of the Social Security Amendments of 1977 (taking into account the amendment made by subsection (a) of this section as well as the provisions of such section 334), and shall report to the Congress no later than May 15, 1983, his recommendations for any permanent legislative changes in such provisions (or in the applicability of such provisions) which he may consider appropriate.
- (c) TECHNICAL AMENDMENTS.—Subsections (b)(4)(A), (c)(2)(A), (e)(8)(A), (f)(2)(A) and (g)(4)(A) of section 202 of the Social Security Act are each amended by inserting "for purposes of this title" after "as defined in section 210".
- (d) EFFECTIVE DATE.—The amendments made by subsections (a) and (c) of this section shall be effective with respect to monthly insurance benefits for months after November 1982.

And the House agree to the same.

APPENDIX B

December 21, 1982

H. 10654

CONGRESSIONAL RECORD—HOUSE

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

Public Pension Offset

Present law.—Prior to 1977 social security spouse's benefits were available only to men who could meet a dependency test and to women, all of whom were presumed to be dependent. These provisions were declared in March 1977 (Califano v. Goldfarb) unconstitutional since they applied differently to men and women.

The Social Security Amendments of 1977 responded to the Goldfarb decision by providing, except for beneficiaries who are covered by the public pension offset exception clause, that social security dependents' benefits which are paid to spouses of retired, disabled, or deceased workers are reduced dollar-fordollar by an amount equal to any public pension which the spouse receives as a result of his or her own employment by a Federal, state or local government which is not covered by social security. (Non-covered government employment is defined as employment not covered under section 210 of the Social Security Act on the last day the spouse was employed by the government.)

Under the exception clause (which expired December 1, 1982), the offset would not apply if: (1) a beneficiary is either receiving or eligible to receive a government pension based on non-covered employment for any month in the period December 1977 through November 1982, and (2) the beneficiary, at the time of filing for social security dependents' benefits, meets all the requirements for entitlement as they were

in effect and being administered in January 1977. The law in January 1977 required men, but not women, to prove they were dependent on their spouses for at least one-half of their support in order to qualify for the spouse benefit.

House bill.—The House bill provides that during the 60 month period beginning with December 1982, the amount of the public pension used for purposes of the public offset shall be an amount equal to one-third of the public pension.

Senate amendment. - No provision.

Cost effect.—According to unofficial estimates of the Congressional Budget Office, the House bill would increase outlays by the following amounts (by fiscal years, in millions of dollars):

1983	15
1984	40
1985	65
1986	85
1987	108
1988	30

Conference agreement.—The Conferees agreed that, in lieu of a modification of the public pension offset clause, the public pension offset would not apply to an individual who becomes eligible for a public pension prior to July 1983 if that individual is dependent upon his or her spouse for one-half support. The one-half support test would be applied according to the pre-1977 law, except that it would apply to both men and women.

The amendment would also require the Secretary of Health and Human Services to study the pension offset provisions and

to report his recommendation for any permanent legislation that may be appropriate by May 15, 1983.

In addition, the Conferees agreed to specify the definition of non-covered government employment as government employment which on the last day the spouse was employed, was not covered employment for purposes of title II of the Social Security Act.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

CIVIL ACTION NO. 80-8022-Civ AHL

Stanley Wachtell, SS # 069-16-6067, Plaintiff,

V

Richard S. Schweiker, Secretary of Health and Human Services, Defendant.

REPORT & RECOMMENDATION

This is a review of a final decision of the Secretary of Health and Human Services of the United States of America, who has determined that the Plaintiff was not entitled to Husband's Insurance Benefits under Section 202(c) of the Social Security Act, 42 U.S.C. Section 402(c), as amended, and that claimant was overpaid benefits in the amount of Eight Hundred Dollars Ten (\$800.10) Cents.

The Honorable Alcee L. Hastings, United States District Judge, has referred this cause to the undersigned for review of the administrative record and preparation of a recommended decision as to whether the record contains substantial evidence to support the administrative decision. Mathews v. Weber, 423 U.S. 261 (1976). Moreover, in light of the fact that the administrative law judge determined that questions of constitutionality pertaining to the Social Security Act or amendments thereto were not properly before his forum, the Court will consider the constitutional question presented by Plaintiff.

For its consideration in this case, the Court has the Complaint and Answer, which were filed together with a certified transcript of the record, including the evidence upon which the findings and decision complained of are based. In addition, the Secretary has filed a Motion for Summary Judgment with Memorandum in Support of the Motion. The Plaintiff has also filed a Motion for Summary Judgment with Supporting Memorandum and a "Brief in Opposition to Defendant's Motion for Summary Judgment".

It appears that all administrative remedies have been exhausted, and the case is now ripe for decision pursuant to 42 U.S.C. Section 405(g).

Plaintiff seeks to retain Husband's Insurance Benefits in addition to his pension from the federal Government. The facts are undisputed. Plaintiff filed an application for husband's insurance benefits under Title II of the Social Security Act on August 23, 1977. On December 1, 1977, Plaintiff was notified that he was entitled to receive Husband's Insurance Benefits under Section 202(c) of the Social Security Act, 42 U.S.C. Section 402(c), which provides benefits to the husband of an individual entitled to old-age or disability benefits, if such husband:

- (a) has filed application for husband's insurance benefits;
- (b) has attained age 62, and
- (c) is not entitled to old-age or disability benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife.

Plaintiff Wachtell received these benefits monthly beginning in December, 1977. On September 1, 1978, the Plaintiff was notified that because he was receiving a federal pension which exceeded the amount due him as spouse's benefits, he was not entitled to receive husband's insurance benefits. The Defendant ordered all further benefits be discontinued and determined that

Plaintiff had been overpaid spouse's benefits in the amount of Eight Hundred Dollars Ten (\$800.10) Cents for the period December, 1977 through August, 1978.

The Secretary's decision was based upon the amendments made to the Social Security Act by Congress on December 20, 1977, which included a "pension offset" provision to the monthly insurance benefits payable under Title II of the Social Security Act. Section 334, Social Security Amendments of 1977, Pub. L. 95-216, 91 State. 1544 et seq. The pension offset provision provides that the monthly benefit amount of a spouse's benefit will be reduced by an amount equal to the amount of any monthly benefit payable to the individual from a federal or state pension. Section 334(f) of Public Law 95-916 provides:

The amendments made by this section shall apply with respect to monthly insurance benefits payable under Title II of the Social Security Act for months beginning with the month in which this Act is enacted, on the basis of applications filed in or after the month in which this Act is enacted.

Thus, the pension offset provisions of Pub. L. 95-216 apply to all benefits payable under Title II effective December 1977. Plaintiff filed his application on August 23, 1977, but the first month for which he met the eligibility requirements for husband's benefits was December, 1977. Therefore, pursuant to Section 202(j) of the Social Security Act, 42 U.S.C. 402(j)(2), the Administration deemed his application to have been filed in December, 1977, and subject to the pension offset provision of the 1977 Amendments.

On September 6, 1978, Plaintiff requested reconsideration of the initial determination which found him subject to the Government pension offset (Tr. 115). In a reconsideration determination issued September 28, 1978, the initial determination was affirmed (Tr. 116-118). The Plaintiff requested a hearing before an administrative law judge (Tr. 127-129), which was held on June 26, 1979 (Tr. 23-94). On September 28, 1979, the administrative law judge issued a decision affirming application of the Government pension offset to Plaintiff's entitlement and finding him in receipt of an overpayment in benefits of Eight Hundred Dollars and Ten (\$800.10) Cents (Tr. 4-17). Plaintiff requested Appeals Council review of the administrative law judge's decision (Tr. 3). On November 23, 1979, the Appeals Council denied the request for review, making the administrative law judge's decision the final decision of the Secretary subject to judicial review (Tr. 2).

The applicable provision of the Social Security Act is Section 202(c), 42 U.S.C. Section 402(c), which provides in pertinent part:

- (c)(1) The husband . . . of an individual entitled to old-age or disability insurance benefits, if such husband—
 - (A) has filed application for husband's insurance benefits,
 - (B) has attained age 62, and
 - (C) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife,

shall be entitled to a husband's insurance benefit for each month . . .

(2)(A) The amount of a husband's insurance benefit for each month... shall be reduced (but not below zero) by an amount equal to the amount of any monthly periodic benefit payable to such husband for such month which is based upon his earnings while in the service of the Federal Government or any State (or political subdivision thereof, . . .) if, on the last day he was employed by such entity, such service did not constitute "employment" as defined in section 410 of this title.

Section 402(c)(2)(A) is the pension offset provision added by the Social Security Amendments of 1977 and the basis of the Secretary's decision that the Plaintiff is not entitled to spouse's benefits.

However, the Social Security Amendments of 1977 contain an important exception to the operation of the various pension offset provisions. Section 334(g) of Pub. L. 95-216 provides the pension offset provisions

"shall not apply with respect to any monthly insurance benefit payable . . . to an individual (A) to whom there is payable for any month within the 60-month period beginning with the month in which this Act is enacted [December, 1977] . . . a monthly periodic benefit . . . based upon such individual's earnings while in the service of the Federal Government . . . and (B) who at time of application for or initial entitlement to such monthly insurance benefit . . . meet the requirements of that subsection as it was in effect and being administered in January 1977."

The interpretation of this exception clause is the basis of the Plaintiff's complaint that he has been unconstitutionally denied husband's insurance benefits. Although there is an indication in the administrative record that Plaintiff previously challenged the offset provision itself as an unconstitutional deprivation of his fifth amendment rights, the Plaintiff has not presented the issue in this cause. The Plaintiff challenges the Secretary's decision that he is not entitled to the protection of the exception clause, Section 334(g), Pub. L. 95-216.

The Secretary has determined that although the Plaintiff meets the other requirements of the exception clause [Section 334(g)], he does not meet the requirements of Section 202 of the Act "as it was in effect and being administered in January 1977". The Secretary has interpreted that phrase to mean that in addition to the other requirements for husband's insurance benefits which Plaintiff has met, he would have to prove he was receiving at least one-half of his support from his spouse.

The Plaintiff maintains that the Secretary's interpretation of the exception clause to the offset provision is unconstitutional in that it discriminates against him solely on the basis of sex and violates the equal protection component of the fifth amendment to the United States Constitution.

In January of 1977, Section 202(c) of the Social Security Act provided husband's insurance benefits if such husband—

- (A) has filed application for husband's insurance benefits,
- (B) has attained age 62,
- (C) was reciving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from such individual—
 - (i) if she had a period of disability which did not end prior to the month in which she became entitled to old-age or disability insurance benefits, at the beginning of such period or at the time she became entitled to such benefits, or
 - (ii) if she did not have such a period of disability, at the time she became entitled to such benefits,

and filed proof of such support within two years after the month in which she filed application with respect to such period of disability or after the month in which she became entitled to such benefits, as the case may be, or, if she did not have such a period, two years after the month in which she became entitled to such benefits, and (D) is not entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife.

The requirement of Section 202(c), 42 U.S.C. 402(c), which provided that a husband seeking insurance benefits through his wife's benefits must show that he received at least one-half support from her was not imposed upon a woman seeking insurance benefits through her husband's account; she was presumed dependent. In 1977, the Supreme Court held a dependency requirement for men but a presumption of dependency for women was an unconstitutional violation of due process and equal protection. Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed. 2d 270 (1977). At the same time, the Supreme Court affirmed the 1975 decisions of this Court and of the District Court for Maryland that the dependency requirement of 42 U.S.C. 402(c) was violative of the equal protection guarantee of the Fifth Amendment. Silbowitz v. Secretary of Health, Education and Welfare, 397 F.Supp. 862 (S.D. Fla. 1975), aff'd mem., 430 U.S. 924, 97 S.Ct. 1539, 51 L.Ed.2d 768 (1977); Jablon v. Secretary of Health, Education and Welfare, 399 F.Supp. 118 (D. Md. 1975), aff'd mem., 430 U.S. 924, 97 S.Ct. 2535, 51 L.Ed.2d 768 (1977). In both cases, the courts' decisions required that the Social Security Act be interpreted and enforced without reference to the dependency requirement.

The Secretary now urges that the Plaintiff does not qualify for husband's insurance benefits under the exception to the off-set provisions because he cannot prove dependency on his wife. The Secretary's interpretation of the phrase "as it was in effect and being administered in January 1977" cannot be accepted. The Secretary's interpretation would compel the Court to accept the premise that the law is only that which is printed in the statutes and would have the Court ignore the decisions in Califano, Jablon and Silbowitz.

In short, the Secretary's interpretation of the exception clause would extend for five years a provision which the Courts have declared unconstitutional. Clearly, no Act of Congress can authorize a violation of the Constitution. Almeida-Sanchez v. United States, 413 U.S. 266, 272, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973). Nor may Congress by its legislation override the Constitution. Brubaker v. Board of Education, 502 F. 2d 973, 989 (7th Cir. 1974).

It has been established since 1803 that a federal court has the power to refuse to give effect to congressional legislation if it is inconsistent with the court's interpretation of the Constitution. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). However, it is also a familiar principle of constitutional adjudication that the court's duty is to construe a statute, if possible, in a manner consistent with the court's interpretation of the Constitution; in this case, in a manner consistent with the fifth amendment.

When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Crowell v. Benson, 285 U.S. 22, 62 as cited in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936) (Brandeis, J. concurring).

The Secretary's interpretation that Congress intended to reestablish the requirement that men prove dependency but to keep the presumption of female dependence would mean that Congress intended to re-establish a discriminatory provision of the Social Security Act which has been declared unconstitutional. Such an interpretation cannot be substantiated. As the legislative history of the exception clause indicates, Congress intended to protect the reliance interest of people who had already retired or were close to retirement: Inclusion of this exception to the applicability of the Senate provision reinforces its prospective nature and avoids penalizing people who are already retired, or close to retirement, from public employment and who cannot be expected to readjust their retirement plans to take account of the "offset" provision that will apply in the future.

Social Security Amendments of 1977, Conference Report No. 95-837, 95th Cong., 1st Sess., p. 72.

The Secretary cites this very language in his brief in support of motion for summary judgment. To be sure, the Conference Report does indicate that the "managers" were concerned that there would be large numbers of women who were receiving. Government pensions of would be receiving Government pensions who had planned on full wife's or widow's benefits. However, as the language cited above indicates, the major purpose of the exception clause appeared to be to protect the reliance factor of people who were already receiving Government pensions or would be receiving pensions within five years. The Secretary's interpretation of the exception clause would mean that the reliance interest of a female claimant on November 1, 1982, approximately five years after enactment of the offset provision, would be greater than Mr. Wachtell's reliance interest as it existed on December 1, 1977, approximately two and one-half years after this Court's decision that the dependency requirement of 402(c)(1) was unconstitutional, and approximately nine months after that decision was affirmed by the Supreme Court.

The Court agrees with the Government's position that "Congress enacted the exception based upon the reasonable, valid assumption that individuals who were already retired or who would retire shortly after the pension offset was enacted would not have time to alter their retirement plans to accommodate the absence of a full spouse's benefit". However, the Court cannot agree with the Secretary's interpretation that Plaintiff Wachtell was not included among those individuals. The exception

clause's requirement that individuals who meet "the requirements of that subsection as it was in effect and being administered in January 1977" must be interpreted to mean the requirements of the subsection in light of the decision in Silbowitz, Jablon, and Goldfarb. The Court notes that Congress specifically considered the Supreme Court's decision in Goldfarb when it enacted the 1977 Social Security Amendments. Consistent with the Court's interpretation of the fifth amendment, the dependency clause has been removed from Section 202(c), 42 U.S.C. Section 402(c)(1). Therefore, male and female applicants for spousal benefits are treated equally. Congress then enacted an offset provision for claimants who are receiving a pension based upon earnings while in the service of the Federal Government or any State (or political subdivision thereof). The offset provision applies equally to both male and female applicants. Congress also indicated concern that the offset provision would penalize those people who had already retired and were receiving a Government pension or who would soon receive a Government pension. Therefore, the exception clause was enacted to reinforce the prospective nature of the offset provision and to avoid penalizing people who had already retired or were close to retirement. Conference Report, supra, at 72. There is no indication that Congress intended that the Supreme Court's decisions be ignored and the exception clause be interpreted to require a presumption of dependency for female applicants and a dependency test for male applicants in violation of the fifth amendment. Inded, the indications are contrary. As stated, Congress had just abolished the genderbased dependency requirement. It would be irrational to assume that Congress intended to include the gender-discriminatory standard as a requirement in the exception clause.

The exception clause is a valid attempt by Congress to assure the pension offset clause be prospective in nature. However, the Secretary's interpretation of that clause which denies benefits to Plaintiff Wachtell is not consistent with the intent of the legislation. The Court notes that the issue presented herein has also been considered by the United States District Court for the Northern District of California. It, too, found that "only those constitutional portions of the Social Security Act as it stood in January 1977 are to serve as the measure of whether an individual has fulfilled the requirements necessary to qualify for the exception" to the offset provision. Webb v. Harris, 509 F.Supp. 1091, 1095 (N.D. Calif. 1981).

Considering the constitutional portions of the Social Security Act as it stood in January, 1977, the Plaintiff has fulfilled the requirements necessary to qualify for the exception to the offset provision and is entitled to receive his husband's insurance benefits.

It is, therefore, the recommendation of the undersigned that Plaintiff's motion for summary judgment be GRANTED and the Secretary be ordered to reinstate Plaintiff's husband insurance benefits.

Pursuant to Title 28 U.S.C. Section 636(b)(1), the parties may serve and file written objections to this report with the Honorable Alcee L. Hastings, United States District Judge, within ten (10) days after being served with a copy of this report.

DATED at Miami, Florida, this 16 day of June, 1981.

/s/ Herbert S. Shapiro
UNITED STATES MAGISTRATE

^{&#}x27;As discussed in Webb, in addition to the factors already discussed, "the nature of the Social Security legislation itself also must be considered in interpreting Section 334(g)". Webb v. Harris, 509 F.Supp. at 1094. The Court is required to consider the remedial purpose of the Social Security Act; this Circuit has long stated that the Act should be liberally construed in favor of coverage if such construction is reasonable. Broussard v. Weinberger, 499 F.2d 969 (5th Cir. 1974); Sanchez v. Schweiker, 643 F.2d 1128 (5th Cir. 1981).

FILED
MAR 11 1963

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

ROBERT H. MATHEWS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

REPLY BRIEF FOR THE APPELLANT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 638-2217

TABLE OF AUTHORITIES

Cases:	Page
Brookins v. O'Bannon, No. 82-1380 (3d Cir. Feb.	
4, 1983)	10
Buckley V. Valeo, 424 U.S. 1	10
Califano V. Goldfarb, 430 U.S. 199	
Califano V. Westcott, 443 U.S. 76	9
Champlin Refining Co. v. Corporation Commission, 286 U.S. 210	10
Gebbie V. United States Railroad Retirement Board, 631 F.2d 512	6, 7
Mississippi University for Women v. Hogan, No. 81-406 (July 1, 1982)	7
Rosofsky V. Schweiker, 523 F. Supp. 1180, prob. juris. noted, No. 81-1551 (May 3, 1982), appeal	
dismissed (June 22, 1982)	5, 6
Swain v. Pressley, 430 U.S. 372	2
United States v. Batchelder, 442 U.S. 114	2
United States v. Testan, 424 U.S. 392	9
Wengler V. Druggists Mutual Insurance Co., 446 U.S. 142	7
Constitution and statutes:	
United States Constitution, Fifth Amendment (Due Process Clause)	9
Social Security Act, 42 U.S.C. (& Supp. IV) 301 et seq.:	
42 U.S.C. (Supp. IV) 402(b)	2
42 U.S.C. (Supp. IV) 402(c)	2
Social Security Amendments of 1977, 42 U.S.C.	
(Supp. IV) 402 note	1
Section 334(f)	8
Section 334(g)	
Section 334(g)(1)	
Section 334(g) (1) (A)	
Section 334(g) (1) (B)	
Section 334(g) (2)	
Section 334(g) (3)	
45 U.S.C. 231b(h) (3)	
Pub. L. No. 97-455, 96 Stat. 2497	8
	100000
Section 7, 96 Stat. 2501	0, 4

M

the state of the s	
liscellaneous:	Page
123 Cong. Rec. H12990-H12991 (daily ed. Dec. 15, 1977)	3
H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. (1977)	3, 10
H.R. Conf. Rep. No. 97-985, 97th Cong., 2d Sess. (1982)	4
President Carter's Social Security Proposals: Hearings Before the Subcomm. on Social Secu-	
rity of the House Comm. on Ways and Means, 95th Cong., 1st Sess. (1977)	2
S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess.	0.10
(1977)	3, 10
Social Security Claims Manual Transmittal No.	•
3844 (July 14, 1976)	6

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1050

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

ROBERT H. MATHEWS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

REPLY BRIEF FOR THE APPELLANT

In their Motion to Affirm, appellees argue, in the alternative, that Section 334(g)(1) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402 note, either does not incorporate a gender-based classification or violates equal protection constraints if it does. They further assert that the district court properly concluded that Section 334(g)'s severability clause constitutes an impermissible intrusion upon the power of the federal courts. None of these contentions is sound, and this case plainly warrants plenary review by this Court.

1. Appellee's "threshold thesis" is that "Congress intended [Section 334(g)(1)] to protect the reliance interests of soon to retire men and women without reference to a gender-based dependency test" (Mot. to Aff. 6). Appellees assert (id. at 7) that the Court should adopt this construction of Section 334(g)(1) in order to avoid the constitutional issues presented by this case. But "the maxim that statutes should be construed to avoid constitutional questions offers no assistance here. This "cardinal principle" of statutory construction " " is appropriate only when [an alternative interpretation] is "fairly possible"

from the language of the statute." United States v. Batchelder, 442 U.S. 114, 122 (1979) (quoting Swain v. Pressley, 430 U.S. 372, 378 n.11 (1977)). Appellees' construction of Section 334(g) is not "fairly possible" because the plain language of the statute, as well as its legislative history, evidences Congress' intent to incorporate a gender-based dependency test into the legislation.

Section 334(g) expressly states that, in order to qualify for exemption from the pension offset provisions of the Social Security Amendments of 1977, a claimant must be eligible for spousal benefits under the law "as it was in effect and being administered in January 1977" (Section 334(g)(1)(B), 42 U.S.C. (Supp. IV) 402 note). In January 1977, the Social Security Act required men, but not women, to prove that they were dependent on their spouses for at least one-half of their support prior to receiving spousal benefits. Compare 42 U.S.C. 402(b) with 42 U.S.C. 402(c).

Contrary to appellees' assertion (Mot. to Aff. 8-9). the legislative history of Section 334(g) unquestionably demonstrates Congress' intent to incorporate a gender-based one-half support requirement into the pension offset exception. As explained in our Jurisdictional Statement (at 10-11), Congress enacted the pension offset provisions of the Social Security Amendments of 1977 to eliminate the payment of spousal benefits to retired male government workers who, in most instances, were not dependent upon their spouses but who nevertheless were eligible for benefits under this Court's decision in Califano v. Goldfarb, 430 U.S. 199 (1977). S. Rep. No. 95-572, 95th Cong., 1st Sess. 27-28 (1977); President Carter's Social Security Proposals: Hearings Before the Subcomm, on Social Security of the House Comm. on Ways and Means, 95th Cong., 1st Sess. 158 (1977). The sole rationale presented by Congress for Section 334(g)'s exception to these pension offset provisions was to protect the reliance interests of "large numbers of women, especially widows in their late fifties * * *. whose retirement income was planned for on the assumption of the availability of full wife's or widow's benefits under social security" (H.R. Conf. Rep. No. 95-807, 95th Cong., 1st Sess. 71-72 (1977); S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. 71-72 (1977)). Thus, Congress enacted Section 334(g) primarily to protect the interests of "large numbers of women" (H.R. Conf. Rep., No. 95-837, supra, at 71-72; S. Conf. Rep. No. 95-612, supra, at 71-72), and the pension offset exception accordingly was limited to those persons eligible for spousal benefits under the Act as it was "in effect and being administered in January 1977" (Section 334(g)(1)(B), 42 U.S.C. (Supp. IV) 402 note). See 123 Cong. Rec. H12990-H12991 (daily ed. Dec. 15, 1977) (remarks of Rep. Harris) ("The apparent rationale for the offset provision is that men who receive public pensions will get some sort of a 'windfall' if they are allowed to receive social security dependent's benefits, and that since they may not be 'truly dependent,' they must be able to 'prove' their dependency in order to get a permanent exemption from the offset provision").

Congress' recent enactment of a new pension offset exception underscores the fact that Section 334(g) requires men, but not women, to prove dependency in order to claim the benefits of the section. Section 334(g) expired on December 1, 1982. Section 334(g) (1)(A), 42 U.S.C. (Supp. IV) 402 note. On January 12, 1983, President Reagan signed Pub. L. No. 97-455, 96 Stat. 2497, which contains a new exception to the pension offset provisions of the Social Security Amendments of 1977. Section 7 (96 Stat. 2501). The new provision exempts an individual who

becomes eligible for a public pension prior to July 1983 from the pension offset provisions of the 1977 legislation, so long as "that individual is dependent upon his or her spouse for one-half support." H.R. Conf. Rep. No. 97-985, 97th Cong., 2d Sess. 13 (1982). The House Conference Report, in comparing the new provision with Section 334(g), notes that the express terms of Section 334(g) provide an exception only for those claimants who meet "the requirements for entitlement as they were in effect and being administered in January 1977" (ibid.). The law in 1977, the report states, "required men, but not women, to prove they were dependent on their spouses for at least one-half of their support" (ibid.). The new pension offset exception, by contrast, applies the one-half support test to "both men and women" (ibid.). Thus, the legislative history of the most recent pension offset exception demonstrates beyond cavil that Section 334(g) incorporates a genderbased support requirement.1

¹ Neither the fact that Section 334(g) expired on December 1, 1982, nor the enactment of Pub. L. No. 97-455 should affect this Court's decision to hear the appeal in this case. Although Section 334(g) expired on December 1, 1982, the section, by its express terms, still applies to claimants filing after November 1982 so long as they would have been eligible for a government pension prior to December 1982 had they made proper application for such benefits. Section 334(g)(2), 42 U.S.C. (Supp. IV) 402 note. Benefits payable after December 1982 to claimants satisfying the offset exception prior to that date are not subject to the offset. See J.S. 11 n.6. Section 7 (96 Stat. 2501), moreover, does not replace Section 334(g), but merely provides a new pension offset exception, which expires in July 1983, for any person who can show dependency on his or her spouse. Women who qualified for a government pension prior to December 1982 will undoubtedly prefer to invoke Section 334(g), inasmuch as it does not require a showing of dependency.

In the face of the clear language of Section 334(g) and its legislative history, appellees assert that spousal benefits were administered without regard to dependency in January 1977 and that, in light of Califano v. Goldfarb, supra, Congress could not have intended to incorporate a gender-based dependency test into the pension offset exception (Mot. to Aff. 9-11). Neither contention is persuasive.

Appellees' contention (Mot. to Aff. 9) that the law "in effect" in January 1977 did not include a genderbased dependency test is erroneous. Assuming, for the sake of argument, that the Social Security Claims Manual in January 1977 did provide that a genderbased dependency test would not be enforced pending the outcome of the Goldfarb litigation, there is no reason to suppose that Congress was aware of this fact when it enacted Section 334(g). When Congress expressly provided that Section 334(g) would apply only to those persons eligible for spousal benefits under the law "as it was in effect and being administered in January 1977," Congress clearly meant the law as written-even if that law was ineffective because of a constitutional defect. There would have been no other reason to choose the January 1977 date.2 In any event, the Social Security Claims Manual clearly demonstrates that the law "in effect" in January 1977 included a gender-based dependency test for spousal

² As the district court in Rosofsky v. Schweiker, 523 F. Supp. 1180, 1184 (E.D.N.Y. 1981), prob. juris. noted, No. 81-1551 (May 3, 1982), appeal dismissed (June 22, 1982), noted in rejecting the exact argument submitted by appellees: "[T]o construe the 1977 amendments as [appellees] urge[] would be to disregard the manifest purpose of Congress to limit the exception to those entitled to spousal benefits under the Act as written in January 1977 and not to include those who received benefits as a result of the courts' striking down of the support requirement. The court is not required to read statutory language so literally as to defeat its aim."

benefits. The manual noted that, while the dependency test's constitutionality had been challenged, "the law remains unchanged and no payment can be made until a final decision has been rendered on the constitutionality of the one-half support requirement" (Social Security Claims Manual Transmittal No. 3844 (July 14, 1976) (emphasis added)). Thus, although appellees imply otherwise (Mot. to Aff. 9-10), the spousal benefits law in January 1977 was "being administered" in accordance with the requirements set forth by Congress, and no spousal benefits were being paid to male claimants who failed to demonstrate one-half dependency on their wives.

Appellees assert that "the most persuasive statutory construction approach is to interpret the exception clause in light of the Goldfarb decision" (Mot. to Aff. 10). We agree. "There should be no question that Congress was aware of this decision when it enacted the government pension offset provision and the accompanying exception clause" (ibid.). Indeed, it was precisely because of the Goldfarb decision that Congress restricted the applicability of Section 334(g) solely to those persons who were eligible for spousal benefits under the law as it was "in effect and being administered in January 1977" (Section 334(g)(1) (B), 42 U.S.C. (Supp. IV) 402 note). "If Congress had wished to provide the exception to male applicants without regard to dependency, it would certainly have selected a control date after the March 1977 Supreme Court decisions, not before." Rosofsky v. Schweiker, supra, 523 F. Supp. at 1185.3

^a Gebbie v. United States Railroad Retirement Board, 631 F.2d 512 (7th Cir. 1980), relied upon by appellees (Mot. to Aff. 10), is not to the contrary. In that case, Congress had provided that dual benefits under both the railroad retirement and social security programs could be paid if the applicant was entitled to social security benefits under the law

2. Appellees next argue (Mot. to Aff. 11-14) that, assuming Congress did intend to apply a one-half support test to husbands under the pension offset exception, Section 334(g) fails to meet constitutional standards.4 In our Jurisdictional Statement, we argue that Congress "enacted the pension offset exception in order to protect those retired or soon-to-be retired spouses who reasonably relied on the terms of the pre-Goldfarb spousal benefits provisions" (J.S. 15). We further suggest that the exception is substantially related to the achievement of "the important governmental objective of protecting reliant spouses against financial hardships that could result from an unexpected reduction of spousal benefits" (J.S. 17). Appellees assert that this is an insufficient justification for Section 334(g)'s incorporation of a dependency test because it fails to protect the reliance interests of "the 29,026 males claiming entitlement to spousal benefits after the Goldfarb decision but prior to the effective date of the Social Security Amendments of 1977" (Mot. to Aff. 13).

The short answer to appellees' argument on this point is that neither Section 334(g) nor the Secretary's construction of the section adversely affects the

[&]quot;as in effect on December 31, 1974" (45 U.S.C. 231b(h)(3)). The court of appeals concluded that this language did not insulate social security benefits from the impact of the Goldfarb decision. Unlike the present case, however, there was no evidence in Gebbie that Congress selected December 31, 1974, specifically to adopt the language of the Act as it read prior to Goldfarb.

^{*}A gender-based classification will be upheld if it "serves 'important governmental objectives and * * * the discriminatory means employed' are 'substantially related to the achievement of those objectives' "(Mississippi University for Women v. Hogan, No. 81-406 (July 1, 1982), slip op. 6 (quoting Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 150 (1980)).

legitimate reliance interests of the class specified by appellees. The pension offset provisions of the Social Security Amendments of 1977 apply only to those persons whose "applications [are] filed in or after the month in which this Act is enacted" (Section 334(f). 42 U.S.C. (Supp. IV) 402 note). Hence, the husbands who filed for spousal benefits prior to and including November 1977 are not affected by the 1977 legislation and are not subject to the pension offset. Therefore, because those husbands are not subject to a pension offset, they are eligible for full spousal benefits whether or not they meet the one-half dependency test set forth in Section 334(g). Thus, the only class of persons adversely affected by Section 334(g)'s dependency test are those nondependent husbands who applied for spousal benefits after the effective date of the Social Security Amendments of 1977. While this class of social security claimants may have been disappointed by the 1977 legislation, the class members can hardly claim that "equal protection requires" protection of their "reliance interests" (Mot. to Aff. 13). Appellees may have hoped for the continued windfall payment of full spousal benefits to nondependent husbands, but they certainly have no constitutional claim to such payments.

3. Appellees argue that the district court properly invalidated Section 334(g)'s severability clause because it represents unconstitutional "interference with the judicial function" (Mot. to Aff. 15). This novel

contention is plainly incorrect.

Appellees insist that the "remedy for an equal protection violation is to extend the benefits of the statute to the excluded class" (Mot. to Aff. 14 (footnote omitted)) because "any person whose rights under the Constitution are violated is entitled to an adequate remedy for the violation" (id. at 15). These assertions are such gross oversimplifications that

to state them is almost sufficient to refute them. This Court has never implied that the extension of benefits to an excluded class is the automatic remedy for an underinclusive statute (see Califano v. Westcott, 443 U.S. 76, 89-91 (1979)), and not every person whose rights are infringed is entitled to an "adequate remedy" in court (interpreted by appellees here as the payment of spousal benefits) (Mot. to Aff. 15-16).5 Although the Court has never elaborated "the conditions under which invalidation rather than extension of an under-inclusive federal benefits statute should be ordered" (Califano v. Westcott, supra, 443 U.S. at 90), the severability clause in this case presents a compelling argument for invalidation, rather than extension, of Section 334(g).

Section 334(g)(3) provides, in the clearest terms, that "[i]f any provision of [the pension offset exception], or the application thereof to any person or circumstance, is held invalid, the remainder of [the pension offset provisions] shall not be affected thereby, but the application of [the pension offset exception] to any other persons or circumstances shall also be considered invalid" (Section 334(g)(3), 42 U.S.C. (Supp. IV) 402 note). The clause plainly expresses Congress' intent that "if [Section 334(g)] is found invalid the pension-offset as passed by the Senate would not be affected, and the application of the exception clause would not be broadened to include persons or circumstances that are not included within

⁵ Indeed, the doctrine of sovereign immunity bars a damages remedy against the United States for violation of the Due Process Clause of the Fifth Amendment. See *United States v. Testan*, 424 U.S. 392, 399-407 (1976). None of the cases cited by appellees (Mot. to Aff. 15) in support of their "adequate remedy" argument involved a suit against the federal government.

it." H.R. Conf. Rep. No. 95-837, supra, at 71-72; S. Conf. Rep. No. 95-612, supra, at 71-72. Section 334 (g) (3) is, in effect, a "nonseverability" clause, evidencing "that the Legislature would not have enacted those provisions [of the pension offset exception] which are within its power, independently of that which is not." Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam) (quoting Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932)). This unambiguous indication of congressional intent must be given full effect by the courts. Brookins v. O'Bannon, No. 82-1380 (3d Cir.

Feb. 4, 1983), slip op. 13-16.6

Deferring to the clear legislative intent evidenced in Section 334(g)(3) does not, as appellees claim, "impermissibly impede[] the federal courts from redressing a constitution[al] violation" (Mot. to Aff. 16). Appellees are not constitutionally entitled to the payment of unreduced spousal benefits. Rather, they are entitled to legislative treatment that comports with the dictates of the Due Process Clause. If appellees succeed on their claim that Section 334(g) unlawfully distinguishes between classes of similarly situated individuals, this Court must apply the statute's unambiguous severability clause and invalidate the entire section. Congress has expressed its intent to deny the benefits of Section 334(g) to everyone if the statute cannot be limited to those who Congress believed to be most deserving of the benefits. This result, moreover, gives appellees more "than the dubious satisfaction of seeing wives and dependent hus-

In Brookins v. O'Bannon, supra, slip op. 15, the Third Circuit rejected the contention that a nonseverability clause in a state welfare statute was an unlawful burden on the right to judicial redress because the clause "does no more than express the legislature's intention to repeal [the statute] unless [it] is enforceable."

bands lose their Social Security benefits" (Mot. to Aff. 16). It accomplishes all that appellees claim the Constitution requires—equal treatment.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

REX E. LEE Solicitor General

MARCH 1983

No. 82-1050

FILED

JUN 25 1983

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

W.

ROBERT H. MATHEWS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

JOINT APPENDIX

REX E. LEE, Solicitor General Department of Justice Washington, D.C. 20530 (202) 633-2217

ROBERT W. BUNCH, Peck, Slusher & Bunch 118 West Dr. Hicks Boulevard Florence, Alabama 35630 (205) 766-4490

> Jurisdictional Statement filed December 20, 1982 Probable Jurisdiction Noted March 21, 1983

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Complaint filed December 11, 1979	3
Answer filed March 12, 1980	9
Motion of plaintiffs to amend complaint filed July 7, 1980	11
Motion of plaintiff to certify as class action filed July 7, 1980	13
Motion of plaintiffs for a declaratory judgment filed October 17, 1980	15
Order of the Court noting probable jurisdiction dat- ed March 21, 1983	17

Relevant Docket Entries

		Relevant Docket Entries
DATE 1979	NR	PROCEEDINGS
Dec. 11	2	Complaint with Exhibit "A" attached— filed—sll—Page 1-4
11		Summons and complaint issued—del to USM-s11
Jan. 16		S&C returned executed on U.S. Atty 12/14/79; on Atty Gen 12/18/79 & on HEW 12/18/79—filed—bth
Feb. 13	3	Mo on of deft for Extension of Time to Answer, filed, cs—bth—2/18/80—Order dated February 14, 1980 extending time for deft to Answer 30 days from date of Order—(McFadden)—entered—cm—bth—Pages 5-6
Mar. 12	4	ANSWER of deft to complaint with certified record of proceedings before Bureau of Hearings & Appeals attached thereto, filed sll—Pages 7-59
May 19	5	ORDER dated May 19, 1980—The issues are to be submitted on written briefs; the brief for plffs shall be filed on or before JUNE 30, 1980; the brief for deft to be filed on or before AUGUST 4, 1980. (Hancock)—filed. Entered May 19, 1980—cm—bth—Pages 60-61
July 7	6	Motion of piffs to file supplemental briefs and oral argument, filed, cs. del JFG, s11—Granted 7/11/80, (Guin), filed. Entered July 14, 1980—cm—bth—Page 62
7	7	Motion of plffs to amend complaint, filed, cs, del JFG, sll—Granted 7/11/80 (Guin), filed. Entered July 14, 1980—cm—bth—Page 63
7	8	Motion of plff to certify as class action, filed, cs, del JFG, sll—see 8/10/82 order—certified—Page 64
Aug. 17	9	Motion of plffs for declaratory judgment, filed, cs, del JFG, sl1—Pages 65-66
1981		
Oet9	10	Brief (Supplemental) of the deft in support of mo- tion to affirm, filed—cs—jrc—Pages 67-77
9	11	Memorandum of law of piff, filed—cs phm—Pages 78-93
13	12	Stipulation of parties re numerosity requirement of Rule 23(a)(1), filed—cs phm (let)—Pages 94-95

1982 Aug. 10

ORDER dated 8-10-82 that this cause is CERTI-FIED as a class action defined as all applicants for husbands' insurance benefits under Section 202(c) of the Social Security Act 42 USC 402(c)(2) whose applications, requests for reconsideration, hearings, or Appeals Council reviews have been denied solely because of statutory requirement that husbands must have received more than one-half of their support from their wives in order to be entitled to benefits; and who received notice of such denials on or after the 60th day prior to 12-11-79; that Robert H. Mathews serve as a representative of said class; and that plff Mary M. Mathews is DISMISSED as a plff, filed (Guin), ENTERED 8-11-82 cm phm—Pages *6-97

24 14

24

MEMORANDUM OPINION dated 8-24-82, filed (Guin), ENTERED 8-25-82 cm phm-Pages 98-106 ORDER dated 8-24-82 that Section 334(g)(1)(B) and Section 334(g)(3) of the Social Security Amendments of 1977, P.L. 95-216, are unconstitutional and that deft immediately pay to Mr. Mathews and the members of the class he represents those benefits they would have received had it not been for the operation of Section 334(g)(1)(B) and that deft immediately undertake to identify and notify all members of the class of this decision and order; that deft shall, within 60 days, submit for court's approval a plan for identifying and notifying the class members; that plff may file objections to propose plan within 10 days and that court retains jurisdiction for purpose of implementing this order, filed (Guin), ENTERED 8-25-82 cm phm-Pages 107-108

Sep. 22

15 Notice of appeal to the Supreme Court of defendant from order and memorandum entered 8/25/82, filed—dwm.cm-dwm—Pages 109

22

16 Certificate of defendant of service of notice of appeal to Supreme Court, filed—dwm—Page 110

22

IN THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

Civil Action No. CA 79W5251 NE Filed: Dec. 11, 1979

ROBERT H. MATHEWS, 424-09-7494, AND MARY M. MATHEWS, 423-34-6303 AND OTHERS SIMILARILY SITUATED, PLAINTIFFS

PATRICIA HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, UNITED STATES OF AMERICA. DEFENDANTS

COMPLAINT

1. Jurisdiction of this Court is invoked pursuant to 42 U.S.C. 405(g); Section 422.210 of the Social Security Administration Regulations No. 22 (20 CFR 422.210); 28 U.S.C. Section 1343 (4); and, 28 U.S.C. Sections 2201 and 2202. This suit is authorized pursuant to the Federal Old Age, survivors, and Disability Insurance Benefits Program (42 U.S.C. Sections 401, et seq.). The jurisdiction of this Court is invoked to secure benefits payable to the spouse of a wife covered under the Social Security Act in accordance

with the Social Security Act, as amended.

2. Plaintiff Robert H. Mathews is a 63 year old male residing in Cullman, Alabama. Plaintiff Robert H. Mathews retired from the United States Postal Service effective October 18, 1977. Plaintiff Mary M. Mathews, wife of plaintiff Robert H. Mathews, retired from a local bank in Cullman, Alabama, in June, 1977. On December 15, 1977, plaintiff Robert H. Mathews filed an application for husband's insurance benefits under the Social Security Act on the record of his wife, Mary M. Mathews. On March 13, 1978, plaintiff was notified of his entitlement to benefits under the Social Security Act but that no payment could be made because of his receipt of a Government pension from the U.S. Postal Service. On October 14, 1979, plaintiff Robert H. Mathews was informed that he had exhausted his administrative remedies when the Appeals Council, Social Security Administration, Department of Health, Education and Welfare concluded that there was no basis under the Social Security Regulations for setting aside the original denial of benefits in plaintiff's Robert H. Mathews case. (See Exhibit "A")

3. Plaintiffs bring this action on behalf of themselves as a representative of a class as defined by Rule 23, Federal Rules of Civil Procedure. The class consists of all Federal, State and local employees who are similarly situated, in that, they have been denied spouses' benefits under the Social Security Act. Plaintiff Robert H. Mathews is unable to state the exact number of the class without discovery of defendants books and records, but avers on information and belief that the class exceeds 163,000 members. The members of the class are so numerous as to make it impractical to bring them all before the Court. There are liability and damage questions of law and fact common to the class which predominate over any questions affecting individual members only. Defendant has acted and refused to act on grounds generally applicable to the class.

4. The claims of the plaintiff are typical of the claims of the class, and plaintiff Robert H. Mathews will fairly and

adequately protect the interests of the class.

5. The prosecution of separate actions by individual members of the class would create the risk of (a) inconsistent or varying adjudications in different jurisdictions with respect to individual members of the class which would establish incompatible standards of conduct for defendant; and (b) adjudication with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the members not parties to the adjudications or substantially impair or impede their ability to protect their in erests.

The class action is superior to other available methods for the fair and efficient adjudication of the controversy.

7. Plaintiffs further aver that this cause of action should be certified as a class action under R 23 (a) and (b)(1) and (b)(2) of the Federal Rules of Civil Procedure.

8. Plaintiffs aver that the aforementioned law, as amended, is unconstitutional, in that, it is violative of the rights to equal protection under the due process clause of the Fifth Amendment, to-wit: (a) public sector retirees are discriminated against in that they are treated differenty than private sector retirees with regard to spouses' social security benefits; (b) that under existing law male public sector retirees are discriminated against, in that they are treated differently than male public sector retirees with regard to spouses' benefits, in that, survivor benefits are payable to the widow of a spouse covered under the Social Security Act regardless of the degree of her dependency upon the deceased husband, while survivors benefits are payable to the widower of a spouse covered by the Act only if he meets the requirements set forth in the Social Security Act in effect in January of 1977, which provides that the widower must be receiving at least one-half of his support from his wife; (c) the spouses of public sector retirees are discriminated against, in that, they are treated differently than spouses of private sector retirees, in that, differential treatment of public sector retirees and private sector retirees constitute an invidious discrimination against public sector retirees because the spouses of public sector retirees are required to pay Social Security taxes producing less protection for their spouses than are produced by the efforts of those spouses who work and are married to private sector retirees.

WHEREFORE, Plaintiffs pray judgment against defendant in favor of plaintiffs and each member of their class: (a) enjoining the continuance by the defendant of the illegal acts and practices alleged herein; (b) requiring that defendant pay over to plaintiffs and to the members of the class the damages sustained by plaintiffs and members of the class by reason of defendant's illegal acts and practices; (c) requiring that defendant pay to plaintiffs' and to the

members of the class the costs of this suit and a reasonable attorney's fee, with interest; and (d) such other and further relief that the Court deems appropriate.

PECK, BURDINE AND SLUSHER, ATTORNEYS, P.C.

Attorneys for Plaintiffs

EXHIBIT "A"

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE SOCIAL SECURITY ADMINISTRATION

P.O. BOX 2518 WASHINGTON, D.C. 20013

October 11, 1979 OFFICE OF HEARINGS AND APPEALS

REFER TO: SGC 424-09-7494

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. Robert H. Mathews Post Office Box 54 Cullman, Alabama 35055 Dear Mr. Mathews:

After the request for review of the hearing decision was received, a careful study was made of your case, the applicable law and regulations, the record before the administrative law judge, and the content one made in support of the request.

Section 404.947a of Social Security Administration Regulations No. 4 (20 CFR 404.947a) provides that the Appeals Council will review a hearing decision where: (1) there appears to be an abuse of discretion by the administrative law judge; (2) there is an error of law; (3) the administrative law judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest.

The Appeals Council has concluded that there is no basis under the above regulations for granting the request for review. Accordingly, the hearing decision stands as the final decision of the Secretary in your case.

If you desire a court review of the hearing decision, you may commence a civil action in the district court of the United States in the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable

showing is otherwise made. See Section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)) and section 422.210 of Social Security Administration Regulations No. 22 (20 CFR 422.210).

If a civil action is commenced, the Bill of Complaint should name the Secretary of Health, Education, and Welfare as the defendant and should include the social security number(s) shown at the top of this notice.

Sincerely yours,

David G. Danziger Member, Appeals Council

IN THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

Civil Action No. CA 79W5251-NE Filed: Mar. 12, 1980

ROBERT H. MATHEWS, 424-09-7494, AND MARY M. MATHEWS, 423-34-6303 AND OTHERS SIMILARILY SITUATED, PLAINTIFFS

2.

PATRICIA HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

ANSWER

Comes now the defendant and for answer to complaint filed herein states that:

- 1. In reference to paragraph 1 of the complaint, the defendant admits the allegations contained therein, except to deny that the court has jurisdiction pursuant to 20 C.F.R. §422.210, 28 U.S.C. §1343(4) or 28 U.S.C. §\$2201 and 2202.
- 2. In reference to paragraph 2 of the complaint, the defendant admits the allegations contained therein upon the belief that plaintiff intended to state that he retired from the United States Postal Service effective November 18, 1977, and not October 18, 1977.
- 3. In reference to paragraph 3 of the complaint, this paragraph contains conclusions of law and speculative assertions of plaintiff and not averments of fact to which responses are required; but insofar as responses may be deemed required, defendant denies.
- 4. In reference to paragraphs 4, 5, 6 and 7 of the complaint, these paragraphs contain conclusions of law and not averments of fact to which responses are required; but insofar as responses may be deemed required, defendant denies.
- 5. In reference to paragraph 8 of the complaint, the defendant denies the allegations contained therein.

In accordance with the provisions of section 205(g) of the Social Security Act (42 U.S.C. 405(g)), defendant files herein as part of the answer a certified copy of the transcript of the record including the evidence upon which the findings and decisions complained of are based.

The findings of fact of the Secretary of Health, Education and Welfare are supported by substantial evidence and are

conclusive.

WHEREFORE, defendant prays for judgment dismissing the complaint with costs and disbursements and for judgment in accordance with section 205(g) of the Social Security Act (42 U.S.C. 405(g)), affirming the decision complained of.

J.R. BROOKS United States Attorney

HERBERT J. LEWIS, III Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon counsel for plaintiff, Rodney B. Slusher, 118 West Reeder Street, Florence, Alabama 35630, by mailing the same by first class United States mail properly addressed and postage prepaid on this the 11th day of March, 1980.

HERBERT J. LEWIS, III Assistant United States Attorney

IN THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

Civil Action No. CA 79W5251-NE Filed: July 7, 1980

ROBERT H. MATHEWS AND MARY M. MATHEWS, ET AL, PLAINTIFFS

72

PATRICIA HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, UNITED STATES OF AMERICA, DEFENDANT

MOTION TO AMEND

Comes now the plaintiffs in the above styled cause and moves this Honorable Court for permission to amend the

complaint heretofore filed as follows:

1. Adding the following language after the word "retirees" in the last line of paragraph 8 of the complaint: (d) The government pension offset and Section 402 (c)(1)(c) of the Social Security Act, as applied, discriminates against a non-dependent male because it grants to him less benefits than to a similar situated female. (e) The government pension offset as applied to the husband of Mary M. Mathews is discriminatory in that her social security contributions are worth less to her husband and to her family than a similarly situated male.

2. Delete the following words "public sector" from lines 1 and 3 of section 8(b) of the complaint. Substitute the word "husband" for the word "widower" in lines 4, 6 and 9 of section 8(b) of the complaint. Delete the word "deceased" from line 6 of section 8(b) of the complaint. Delete the word "male" from line 3 of section 8(b) of the complaint and sub-

stitute therefor the word "female".

PECK, SLUSHER, BUNCH, GREEN & SCHUESSLER

Robert W. Bunch, For the Firm Attorney for Plaintiffs 118 W. Reeder St. Florence, AL 35630 (205) 766-4490

I certify that a copy of the foregoing Motion to Amend has been served upon all attorneys of record by mailing them a copy of same by U.S. Mail, postage prepaid this 3rd day of July, 1980.

PECK, SLUSHER, BUNCH, GREEN & SCHUESSLER

IN THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

Civil Action No. CA 79W5251-NE

ROBERT H. MATHEWS AND MARY M. MATHEWS, ET AL, PLAINTIFFS

W.

PATRICIA HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, UNITED STATES OF AMERICA, DEFENDANT

MOTION

Comes now the plaintiff, Robert H. Mathews, and moves this Honorable Court to certify this cause of action as a class action under Rule 23 (a) and (b)(1) and (b)(2); and that the said Robert H. Mathews be deemed a representative of the class, consisting of all husbands who have been denied husband's insurance benefits after December, 1977, and who were denied benefits at some administrative level on or after December, 1977, solely on the basis that they were the husband of a spouse covered under the act and did not meet the one-half support requirement in effect in January, 1977.

PECK, SLUSHER, BUNCH, GREEN & SCHUESSLER

Robert W. Bunch, For the Firm Attorney for Robert H. Mathews 118 W. Reeder St. Florence, AL 35630 (205) 766-4490

I certify that a copy of the foregoing Motion has been served upon all attorneys of record by mailing them a copy of same by U.S. Mail, postage prepaid this 3rd day of July, 1980.

PECK, SLUSHER, BUNCH, GREEN & SCHUESSLER

IN THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

Civil Action No. CA 79W5251-NE Received: October 17, 1980

ROBERT H. MATHEWS AND MARY M. MATHEWS, ET AL, PLAINTIFFS

v.

PATRICIA HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, UNITED STATES OF AMERICA, DEFENDANTS

MOTION FOR DECLARATORY JUDGMENT

 Plaintiffs reallege those allegations contained in the complaint and amendments heretofore filed in the abovestyled cause.

2. Plaintiffs submit that the facts avered under the existing circumstances present a real controversy between parties having adverse legal interests of such immediacy and reality as to warrant a declaratory judgment.

That a declaratory judgment would settle the controversy between the parties and would not cause inconven-

ience to said parties.

4. That Rule 57, Federal Rules of Civil Procedure, authorizes the issuance of a declaratory judgment pursuant to Title 28, U.S.C. Section 2201.

5. That one of the issues before this Honorable Court is whether Section 202(c)(2) of the Act, 42. U.S.C. Section 402(c)(2), the Pension Offset Provision applicable to husband's insurance benefits, is Constitutional.

6. Plaintiffs aver that the Government Pension Offset Provision discriminates against male public sector employees whose spouses are entitled to Social Security benefits because these males must satisfy the conditions of entitlement for husband's and widower's benefits which were in effect in January, 1977, i.e., one-half support requirement.

7. Defendant avers that the Pension Offset Provision and its legislative history, the exception clause applicable to the provision, do not offend principles of equal protection.

WHEREFORE, Plaintiffs demand judgment that the

Court adjudge:

A. That Section 202(c)(2) of the Act, 42 U.S.C. Section 402(c)(2), the Pension Offset Provision, applicable to husband's insurance benefits, be declared unconstitutional.

B. That benefits be retroactively paid to plaintiff Robert

H. Mathews.

PECK, SLUSHER, BUNCH, GREEN & SCHUESSLER

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon counsel for the defendant, Herbert J. Lewis, III, Assistant United States Attorney, 200 Federal Courthouse, Birmingham, Alabama 34203, by mailing the same by first class United States mail, properly addressed and postage prepaid on this the 15th day of Octoaber, 1980.

Robert W. Bunch

In the Supreme Court of the United States

No. 82-1050

MARGARET H. HECKLER, SECRETARY OF HEALTH AND HU-MAN SERVICES, APPELLANT,

89.

ROBERT H. MATHEWS, ET AL.

APPEAL From the United States District Court for the Northern District of Alabama.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

March 21, 1983

Office - Supreme Court, U.S. FILED

JUN 25 1983

No. 82-1050

ALEXANDER L STEVAS.

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

W.

ROBERT H. MATHEWS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE APPELLANT

REX E. LEE Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

MARK I. LEVY
Assistant to the Solicitor General

ROBERT S. GREENSPAN CARLENE V. MCINTYRE Attorneys

Department of Justice Washington, D.C. 20530 (202) 633-2217

CRRECTED COPY

QUESTIONS PRESENTED

- 1. Whether Section 334(g)(1) of the Social Security Amendments of 1977, which creates an exception to the provision requiring that Social Security spousal benefits be reduced by the amount of government pension benefits, violates the equal protection component of the Due Process Clause of the Fifth Amendment because it incorporates a gender-based classification previously held unconstitutional in a different context.
- 2. Whether a severability clause that provides that if any part of Section 334(g)(1) is found invalid the section shall not be applied to any other person or circumstance is an unconstitutional usurpation of judicial power by Congress.

PARTIES TO THE PROCEEDING

Appellee represents a nationwide class composed of "all applicants for husbands' insurance benefits * * * whose applications * * have been denied [on or after October 12, 1979] solely because of the statutory requirement that husbands must have received more than one-half of their support from their wives in order to be entitled to benefits" (J.S. App. 10a).

TABLE OF CONTENTS

		Page
Opini	ons below	1
Juris	diction	1
Const	titutional and statutory provisions involved	1
State	ment	2
Sumn	nary of argument	10
Argu	ment:	
I.	The pension offset exception was intended to in- corporate the gender-based dependency standard in pre-Goldfarb law and therefore does not apply to a nondependent husband such as appellee	15
11.	The gender-based dependency standard incorporated in the pension offset exception does not violate the Due Process Clause	27
	A. A gender-based classification does not violate due process if it substantially serves an im- portant governmental objective rather than reflecting archaic and inaccurate sexual stereotypes	28
	B. The exception clause substantially serves the important governmental objective of protecting the reliance interests of retirees	31
	 Protection of the reliance interests of re- tirees is an important governmental ob- jective 	32
	 The exception clause is substantially re- lated to achievement of the objective of protecting the reliance interests of re- tirees 	38
III.	The severability clause in Section 334 is constitu- tional and, in the event the pension offset ex- ception is invalidated, renders the offset appli- cable without exemption	43
Conel	usion	52
JUHCH	481911	OZ.

TABLE OF AUTHORITIES Page Cases: Aetna Life Insurance Co. v. Haworth, 300 U.S. 49 227 American Paper Institute, Inc. v. American Electric Power Service Corp., No. 82-34 (May 16, 1983) 25 American Tobacco Co. v. Patterson, 456 U.S. 63.... 17 Anderson v. Celebrezze. No. 81-1635 (Apr. 19, 1983) 39 Aptheker v. Secretary of State, 378 U.S. 500 16 Association of Data Processing Service Organizations, Inc. v. Camp. 397 U.S. 150 48 Astrup v. INS, 402 U.S. 509 34 Baker v. Carr, 369 U.S. 186 47 Bradley V. Richmond School Board, 416 U.S. 696 36 Brookins v. O'Bannon, 699 F.2d 648 46 Califano V. Boles, 443 U.S. 282 33 Califano V. Jablon, 430 U.S. 924 Califano v. Silbowitz, 430 U.S. 924 2 Califano v. Torres, 435 U.S. 1 50 Califano v. Webster, 430 U.S. 31329, 31, 32, 35, 38 Caloger v. Harris, No. H-80-388 (D.Md. Mar. 25, Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 45 Chevron Oil Co. v. Huson, 404 U.S. 97 12, 36 City of Rome v. United States, 446 U.S. 156 16 Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480 25

Crowell v. Benson, 285 U.S. 22

Duffy v. Harris, No. 79-386 (D.N.M. Oct. 23,

Davis V. Passman, 442 U.S. 228

1979)

45

47

16

Cases—Continued:	Page
Duke Power Co. v. Carolina Environmental Study	
Group, Inc., 438 U.S. 59	47
Electric Bond & Share Co. v. SEC, 303 U.S. 419	45
Flemming v. Nestor, 363 U.S. 603	31
FPC v. Tuscarora Indian Nation, 362 U.S. 99	34
Frisbie V. United States, 157 U.S. 160	31
Griffin v. Illinois, 351 U.S. 12	36
Heckler v. Campbell, No. 81-1983 (May 16, 1983)	42
Hill v. Wallace, 259 U.S. 44	46, 51
Hisquierdo V. Hisquierdo, 439 U.S. 572	31
Hudgins v. Harris, No. M-79-1939 (D.Md. Apr. 17, 1980)	15
	45, 50
Iowa-Des Moines National Bank v. Bennett, 284	10,00
U.S. 239	48
Kahn v. Shevin, 416 U.S. 351	
Lemon v. Kurtzman:	,
403 U.S. 602	36
411 U.S. 192	-
Lewis v. United States, 445 U.S. 55	17
Los Angeles Department of Water and Power v.	
Manhart, 485 U.S. 702	36
Maher v. Roe, 432 U.S. 464	50
Mathews v. De Castro, 429 U.S. 181	60
Mathews v. Lucas, 427 U.S. 495	42
Michael M. v. Sonoma County Superior Court, 450	
U.S. 464	30, 39
Miller v. Department of Health and Human Serv-	,
ices, 517 F. Supp. 1192	16
Mississippi University for Women V. Hogan,	
No. 81-406 (July 1, 1982)13, 28, 29,	38, 39
Moss v. Secretary of Health, Education, and Wel-	
fare, 408 F. Supp. 403	50
New Orleans v. Dukes, 427 U.S. 297	35
NLRB v. Bell Aerospace Co., 416 U.S. 267	24
Northern Pipeline Construction Co. v. Marathon	
Fipe Line Co., No. 81-150 (June 28, 1982)35,	
Orr v. Orr, 440 U.S. 26828, 47, 48,	49,50
Parham V. Hughes, 441 U.S. 347	28
Personnel Administrator v. Feeney, 442 U.S. 256	28
Powell v. McCormack, 395 U.S. 486	49

ases—Continued:	Page
Procunier V. Navarette, 434 U.S. 555	36
Rinaldi V. Yeager, 384 U.S. 305	39
Rosofsky v. Schweiker, 523 F. Supp. 1180, prob.	
juris, noted, 456 U.S. 959, appeal dismissed, 457	
71 9 1141	25, 27
Rostker v. Goldberg, 453 U.S. 57	39, 42
Scales v. United States, 367 U.S. 203	16
Schlesinger v. Ballard, 419 U.S. 498	30
Seatrain Shipbuilding Corp. v. Shell Oil Co., 444	
U.S. 572	24
Skinner v. Oklahoma, 316 U.S. 535	50
Stanton v. Stanton:	10 50
421 U.S. 7	48, 50
429 U.S. 501	50
Steffel v. Thompson, 415 U.S. 452	49
Swain v. Pressley, 430 U.S. 372	16
Tigner v. Texas, 310 U.S. 141	39
United States v. Batchelder, 442 U.S. 114	16
United States v. Jackson, 390 U.S. 570	45 33
United States v. Lee, 455 U.S. 252	99
United States v. Maryland Savings-Share Insur-	95
ance Corp., 400 U.S. 4	35 35
United States v. Peltier, 422 U.S. 531	99
United States v. Ptasynski, No. 82-1066 (June 6,	32
1983)	-
United States v. Realty Co., 163 U.S. 42734	16
United States v. Sullivan, 332 U.S. 689	
United States v. Testan, 424 U.S. 392	25
United States v. Turkette, 452 U.S. 576	
United States Railroad Retirement Board v. Fritz,	25 27
449 U.S. 166	, 55, 51
Wachtell v. Schweiker, No. 80-8022-Civ-ALH	
(S.D. Fla. Jan. 26, 1982), appeal pending, No.	16
82-5552 (11th Cir. filed Apr. 30, 1982)	47
Warth v. Seldin, 422 U.S. 490	, , ,
Watt V. Western Nuclear, Inc., No. 61-1666 (Saint	26
6, 1983)	
pending, No. 82-2094 (filed June 21, 1983)	16.26
Weinberger v. Salfi, 422 U.S. 749	31, 42
Weinberger V. Saih, 422 U.S. 143	
Weish V. United States, odd U.S. odd	-

Cases—Continued:	Page
Cases—continued Insurance Co., 446	
Wengler v. Druggists Mutual Insurance Co., 446	41,50
U.S. 142	45
Constitution and statutes:	- 11
	31, 48
Railroad Retirement Act of 1974, 45 U.S.C. (& Supp. V) 231	37
Social Security Act, 42 U.S.C. (& Supp. V) 301 et	
seq.: Section 202(b), 42 U.S.C. 402(b) Section 202(b), 42 U.S.C. (& Supp. V) 402	
Section 202(c), 42 U.S.C. 402(c)	17
Section 202(c) (1) (C), 42 U.S.C. 402(c) (1)	. 2
Section 202(c) (1) (C), 42 U.S.C. (& Supp. V)	
Section 202(e), 42 U.S.C. (& Supp. V) 402	2 2
Section 202(f), 42 U.S.C. 402(f) Section 202(f), 42 U.S.C. (& Supp. V) 402	. 2
(f) Section 202(f)(1)(D), 42 U.S.C. 402(f)(1	
(D)	
(A) Section 205(g), 42 U.S.C. (& Supp. V) 40	5
(g) Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509, 42 U.S.C. (Supp. V) 30	o.)1
et 869	
Section 334, 42 U.S.C. (Supp. V) 402 note. Section 334(a)(2), 42 U.S.C. (Supp. V) 402(b)(4)(A)	7)
Section 334(b) (1), 42 U.S.C. (& Supp. V	V)

Constitution and statutes—Continued:	Page
Section 334(b)(2), 42 U.S.C. (Supp. V)	4.6
402(c)(2)(A)	4, 0
Section 334(d) (1), 42 U.S.C. (& Supp. V)	2
402 (f) (1)	
Section 334(f), 42 U.S.C. (Supp. V) 402 note4,	27
Section 334(g), 42 U.S.C. (Supp. V) 402 note.	
Section 334 (g), 42 U.S.C. (Supp. v) 402 note:	43, 51
Section 334(g)(1), 42 U.S.C. (Supp. V) 402	,
	32, 49
Section 334(g) (1) (B), 42 U.S.C. (Supp. V)	
409 note	7
Section 334(g)(3), 42 U.S.C. (Supp. V) 402	
note5, 7, 9, 43, 44, 45,	47, 50
Pub. L. No. 97-455, Section 7, 96 Stat. 2501	5
Pub. L. No. 98-21, 97 Stat. 65 et seq.:	
Sections 301-308, 97 Stat. 109-115	3
Section 337, 97 Stat. 131	5
Miscellaneous:	
123 Cong. Rec. (1977):	
р. 36435	19
p. 36446	19
n. 37196	20
рр. 39031-39032	23
р. 39024	23
p. 39122	19
p. 3913415, 23	, 39, 45
128 Cong. Rec. H10674 (daily ed. Dec. 21, 1982)	24
M Feldstein, Social Security, Induced Retirement,	
and Aggregate Capital Accumulation, 82 J. Pol.	
Econ. 905 (1974)	. 34
M. Flowers, Women and Social Security: An In-	
etitutional Dilemma (1977)	. 54
H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess	90 44
(1977) 3, 5, 13, 21, 36	0, 33, 44
H.R. Conf. Rep. No. 97-985, 97th Cong., 2d Sess	99 94
(1982)	. 20, 24

Miscellaneous—Continued:	D
H.R. Conf. Rep. No. 98-47, 98th Cong., 1st Sess.	Page
H.R. Rep. No. 95-702, 95th Cong., 1st Sess. (1977) H.R. Rep. No. 98-25 (Pt. 1), 98th Cong.	3, 5 20
President Carter's Social Security Proposals: Hearings Before the Subcomm. on Social Secu- rity of the House Ways and Mr.	5
S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess.	
out cong., 1st Sess. (1977) 3,	4, 11,
Social Security Financing Proposals: Hearings Be-	1, 41
(1977)	0.40
95th Cong., 1st Sess., WMCP: 95-57 Summary	,
Passed By the House (Comm. Print 1977) Staff of the House Comm. and William 1977)	40
of the Conference Agreement on H.R. 9846	
1st Sess., Summary of H.R. 9346, the Social Security Amendments of 1977	
Congress (P.L. 95-216) (Comm. Print 1977)21, 23, Subcomm. on Social Security of the House Ways and Means Comm. 95th Cong., 2d Sess., WMCP: 95-72, The Social Security Amendments of 1977 (Public Law 216, 95th Congress) (Comm. Print 1978)	45
C. Weaver, The Crisis in Social Security (1999)	22 34

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1050

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v

ROBERT H. MATHEWS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the district court (J.S. App. 1a-9a) is not reported. The opinions arising out of the administrative proceedings (J.S. App. 13a-14a, 15a-22a, 23a-26a) are not reported.

JURISDICTION

The judgment of the district court (J.S. App. 27a-28a) was entered on August 25, 1982. The notice of appeal (J.S. App. 29a) was filed on September 21, 1982. On November 10, 1982, Justice Powell extended the time for docketing an appeal to and including December 20, 1982. The appeal was docketed on that date, and the Court noted probable jurisdiction on March 21, 1983. The jurisdiction of this Court rests upon 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set out at J.S. App. 30a-34a.

STATEMENT

1. The Social Security Act provides spousal benefits for the wives, husbands, widows, and widowers of retired and disabled wage earners (42 U.S.C. (& Supp. V) 402 (b), (e), and (f); 42 U.S.C. (Supp. V) 402(c)). Spousal benefits are based on the earnings of the retired or disabled wage earner, and are available to persons age 62 or over who are entitled to either minimal or no old-age or disability benefits on their own account. Prior to December 1977, the Act imposed a dependency requirement on men seeking spousal benefits; under this standard, benefits were payable only if husbands or widowers could demonstrate dependency on their wage-earner wives for onehalf of their support. Former 42 U.S.C. 402(c)(1)(C) and (f) (1) (D). Women, on the other hand, could qualify for benefits without having to satisfy a dependency requirement, 42 U.S.C. 402(b).

On March 2, 1977, this Court held that the one-half support requirement for widowers' benefits under former 42 U.S.C. 402(f) violated the equal protection component of the Due Process Clause of the Fifth Amendment. Califano v. Goldfarb, 430 U.S. 199 (1977). Thereafter, on March 21, 1977, the Court summarily affirmed two district court decisions striking down the one-half support requirement for husbands' benefits. Califano v. Silbowitz, 430 U.S. 924 (1977); Califano v. Jablon, 430

U.S. 924 (1977).

Following these decisions, Congress amended the Social Security Act in December 1977. Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509, 42 U.S.C. (Supp. V) 301 et seq. In light of this Court's rulings, Congress eliminated the one-half support eligibility requirements for widowers' and husbands' benefits. Section 334(b)(1) and (d)(1) of the Social Security Amendments of 1977, 42 U.S.C. (& Supp. V) 402 (c)(1) and (f)(1); see S. Rep. No. 95-572, 95th Cong., 1st Sess. 88, 93 (1977).

¹ In addition to removing the one-half support requirement for husbands and widowers, the 1977 amendments also directed that

At the same time, Congress realized that elimination of the one-half support requirements would create a serious fiscal problem for the Social Security trust fund. Generally, a person entitled to two different Social Security benefits does not receive the full amount of both benefits: rather, the two benefits are offset against each other so that the primary Social Security payment is reduced by the amount of the second benefit. 42 U.S.C. 402(k)(3)(A).2 In 1977, however, federal and state government pensions were not subject to the general offset provision of the Social Security Act, and therefore a recipient of such a pension could receive both the government pension and unreduced spousal benefits under the Social Security Act. Elimination of the one-half support requirements made substantial numbers of retired federal and state employees eligible for unreduced spousal benefits based on their spouses' earnings. "This result[ed] in 'windfall' benefits to some retired government employees." S. Rep. No. 95-572, supra, at 28, Congress estimated that these windfall benefits would cost the Social Security system approximately \$190 million in 1979 (ibid.).

In order to reduce this fiscal drain, Congress included a "pension offset" provision in the 1977 amendments to the Act. Parallel to the already existing offset provision for dual Social Security benefits in 42 U.S.C. 402(k)(3)(A), this offset provision generally requires that spousal

[&]quot;the entire question of such gender based distinctions will be included in the 6-month study [by the Department of Health, Education, and Welfare] of proposals to eliminate dependency and sex discrimination provided by this legislation." H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 73 (1977). Subsequently, other gender-based distinctions were eliminated from the Act by the Social Security Amendments of 1983, Pub. L. No. 98-21, Sections 301-308, 97 Stat. 109-115; see H.R. Conf. No. 98-47, 98th Cong., 1st Sess. 140 (1983).

² For example, if an individual is entitled both to benefits on his own work account and to spousal benefits, the worker's benefit is paid in full, with spousal benefits limited to the amount, if any, by which those benefits exceed the worker's benefit.

benefits be reduced by the amount of certain federal or state government pensions received by the Social Security applicant. Section 334(a)(2) and (b)(2) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402 (b)(4)(A) and (c)(2)(A). See S. Rep. No 95-572, supra, at 27-28. The offset applies to spousal benefits payable "on the basis of applications filed in or after the month in which this Act is enacted [December 1977]." Section 334(f) of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1546, 42 U.S.C. (Supp. V) 402 note.

While the pension offset was a reasonable and equitable means of dealing with windfall spousal benefit payments to federal and state retirees who, prior to 1977, had no expectation of receiving them, Congress was concerned about the effect of the new offset provision on those persons-primarily women-who were already retired or soon would retire from government service and who had planned their retirements on the assumption that they would receive full unreduced spousal benefits. Faced with the prospect that this latter group of spouses would, through no fault of their own, be deprived of the benefits they had long expected to receive, Congress chose to exclude them from the pension offset requirement. Thus, Section 334(g)(1) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402 note, excepts from the operation of the pension offset those spouses eligible for a government pension prior to December 1982 who would have qualified for full spousal benefits under the Act "as it was in effect and being administered in January 1977." As noted above, in January 1977 the Act required men. but not women, to demonstrate dependency on their wageearner spouses in order to receive spousal benefits.

² Government pensions are subject to the offset if the employment upon which the pension is based was not covered under Social Security on the last day the individual was employed. Section 334 (a) (2) and (b) (2) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402(b) (4) (A) and (c) (2) (A).

The pension offset exception also contains a severability clause that states that "[i]f any provision of this subsection * * is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid." Section 334(g)(3) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402 note. The severability clause was enacted "so that if [the pension offset exception] is found invalid the pension-offset * * would not be affected, and the application of the exception clause would not be broadened to include persons or circumstances that are not included within it." H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 71-72 (1977).

Neither the expiration of the original exception provision in Section 334(g) nor the enactment of the new exception and offset provisions serves to moot this case. The recent provisions do not supersede or repeal Section 334(g) but merely establish a new exception for people who become eligible for pension benefits subsequent to December 1982 and a new offset applicable to people who become eligible subsequent to June 1983. Section 334(g) still applies to claimants filing after November 1982 provided that they would have been eligible for a government pension prior to December 1982 if they had made a proper application for such benefits; women who qualified for a government pension prior to December 1982 but did not seek benefits at that time remain covered by

^{*}The pension offset exception in Section 334(g) applies to spouses who meet the January 1977 statutory requirements and were eligible for pension benefits prior to December 1982. By its terms, this exception expired on December 1, 1982. On January 12, 1983, a new pension offset provision was signed into law, which excepts from the offset an individual who becomes eligible for a public pension prior to July 1983 and who satisfies a one-half support dependency test. Pub. L. No. 97-455, Section 7, 96 Stat. 2501; see note 12, infra. In addition, on April 20, 1983, Congress enacted a revised pension offset that applies without any exception clause to individuals who become eligible to retire in or after July 1983; however, the amount of the offset is reduced from 100% to two-thirds of the public pension. Pub. L. No. 98-21, Section 337, 97 Stat. 131; see H.R. Conf. Rep. No. 98-47, 98th Cong., 1st Sess. 155 (1983); H.R. Rep. No. 98-25 (Pt. 1), 98th Cong., 1st Sess. 83, 176 (1983).

2. On November 18, 1977, appellee retired from employment with the United States Postal Service (J.S. App. 2a). His wife had retired from her employment four months earlier, and was fully insured under the Social Security Act (*ibid*.). It is undisputed that appellee was not dependent upon his wife for one-half of his support (*id*. at 20a; Mot. to Aff. 5-6).

In December 1977, appellee filed an application for husband's benefits on his wife's account (J.S. App. 2a). On March 23, 1978, the Social Security Administration informed appellee that he was entitled to husband's insurance benefits of \$153.30 per month but that this amount would be offset by his \$573 per month Postal Service pension in accordance with the provisions of Section 334(b)(2) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402(c)(2) (J.S. App. 2a). No net spousal benefits were therefore payable to appellee.

Appellee sought reconsideration of the Social Security Administration's initial decision (J.S. App. 23a) and was subsequently granted a hearing before an administrative law judge. The ALJ concluded that the pension offset provision of the 1977 amendments applied in this case and that appellee did not fall within the terms of the pension offset exception in Section 334(g)(1) (42 U.S.C. (Supp. V) 402 note) because "[h]e was not receiving at least one-half of his support from his wife" (J.S. App. 20a). "Since claimant did not meet the dependency requirements of the law in effect in January of 1977, the government pension offset must be applied on a dollar-for-dollar

Section 334(g) and therefore do not have to prove dependency. Furthermore, this case will determine eligibility to past spousal benefits and continued future spousal benefits for people subject to the 1977 amendments; for example, if the judgment below is affirmed, appellee (and the nationwide class he represents) will be entitled to unreduced spousal benefits for back periods and also to ongoing benefits in the future.

Social Security Award Certificate, dated March 13, 1978 (Tr. 45). ("Tr." refers to the transcript of the administrative proceedings in this case.)

basis against the amount of his husband's benefits. Since his pension exceeds the amount of his husband's insurance benefits, nothing is payable to him" (*ibid.*). The decision of the ALJ was affirmed by the Appeals Council on October 11, 1979, and became the final decision of the Secretary of Health and Human Services (*id.* at 13a-14a).

3. Appellee thereafter brought this class action in the United States District Court for the Northern District of Alabama under Section 205(g) of the Social Security Act, 42 U.S.C. (Supp. V) 405(g). Contending that it was unconstitutional to apply the pension offset provision of the 1977 amendments against him and other nondependent men but not against similarly situated nondependent women, appellee sought a declaration that Section 334(g) (1) (B) of the Social Security Amendments of 1977 (42 U.S.C. (Supp. V) 402 note) violated the Due Process Clause of the Fifth Amendment. Appellee also asserted that the severability clause contained in Section 334(g) (3) of the 1977 amendments was unconstitutional. On August 11, 1982, the district court entered an order certifying a nationwide class composed of "all applicants for husbands' insurance benefits * * * whose applications * * have been denied [on or after October 12, 1979] solely because of the statutory requirement that husbands must have received more than one-half of their support from their wives in order to be entitled to benefits" (J.S. App. 10a).

Two weeks later the district court entered an opinion (J.S. App. 1a-9a) and order (id. at 26a-27a) holding unconstitutional both the pension offset exception in Section 334(g)(1)(B) and the severability clause in Section 334(g)(3). The district court noted that the Act

as it existed in January 1977 required that a husband receive one-half of his support from his wife in

The district court subsequently stayed its order pending appeal to this Court (J.S. App. 12a).

order to be entitled to husband's insurance benefits. In essence, therefore, the exception provides a five-year grace period for all women who retire within five years of the enactment, and for men who retire within five years of the enactment and who are economically dependent upon their wives.

J.S. App. 3a. Thus, "the exception to the pension offset provision differentiates between men (who must prove that they received at least one-half of their support from their wives in order to fall within the exception) and women (who need not prove any spousal support to fall within the exception)" (id. at 4a). This "gender-based classification," the court concluded, can be constitutional only if it "serve[s] important governmental objectives and [is] substantially related to achievement of those objectives' " (ibid., quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

The district court recognized that the congressional purpose in enacting the pension offset exception was to protect the reliance interests of persons, primarily women, who planned their retirements from government service on the assumption that they would receive undiminished spousal benefits (J.S. App. 5a). The court nevertheless reasoned that protection of these reliance interests did not justify incorporating a gender-specific requirement into the pension offset exception. "Although the pension offset was enacted after the Goldfarb decision "," Congress, in requiring that men prove dependency, presumed that women would have relied upon the practices of the Social Security Administration, yet men would not have relied upon a decision of the Supreme Court" (ibid.).

The district court stated that the pension offset exception would be constitutional had Congress required both men and women to show dependency in order to obtain its benefits. However, "[a]lthough Congress considered proof of dependency as a requirement for all applicants seeking to fall within the five-year grace period, it rejected the proposal under the presumption that to require women as

well as men to prove dependency would create an administrative burden upon the system" (J.S. App. 5a-6a). The court found such efficiency considerations to be insufficient to save the statute, concluding that "administrative convenience is a wholly inadequate justification for gender-based discrimination" (id. at 6a). Because the court believed that "there is no rational basis for the discriminatory, gender-based classification contained in Section 334(g)(1)," it held that the "portion of the exception to the pension offset provision that requires a male applicant to prove that he received one-half of his economic support from his wife violates the equal protection guarantees of the due process clause of the fifth amendment" (J.S. App. 6a-7a; footnote omitted).

The district court next noted that Congress, "anticipat[ing] the likelihood that a court would declare the pension offset exception invalid" (J.S. App. 7a), specifically inserted a severability clause into the pension offset exception to prevent its application to non-qualifying claimants should the exception be held invalid in any respect (Section 334(g)(3), 42 U.S.C. (Supp. V) 402 note). The court remarked that "[t]he effect of this severability provision is that if any portion of the pension offset provision is stricken, then the pension offset will be applied to all government retirees, with no exceptions" (J.S. App. 7a). Notwithstanding the clear import of this provision, however, the court felt "compelled" to hold that the severability clause represents "an unconstitutional usurpation of judicial power by the legislative branch of the government" (ibid.).

The district court viewed the severability clause as an attempt by Congress "to mandate the outcome of any challenge to the validity of the [pension offset] exception by making such a challenge fruitless. Even if a plaintiff achieved success in having the gender-based classification stricken, he would derive no personal benefit from the decision, because the pension offset would be applied to all applicants without exception" (J.S. App. 8a). Moreover,

the court found the operation of the severability clause to be "in direct contravention of Congress' avowed intent to protect the expectation and reliance interests of those individuals who had retired or would retire within five years of enactment of the pension offset" (ibid.). Because giving effect to the severability clause would deny the benefits of the pension offset exception to everyone, the court concluded that "the severability clause is not an expression of the true Congressional intent, but instead is an adroit attempt to discourage the bringing of an action by destroying standing" (ibid.).

Reasoning that "[c]ommon sense dictates that in order to allow the elderly to plan their futures, Congress would choose not to destroy the five-year grace period of the pension offset exception" (J.S. App. 8a), the district court ordered that the pension offset exception be expanded to include nondependent husbands. Accordingly, it permitted appellee and all other class members to collect benefits without regard to the pension offset provision of the 1977 Social Security amendments (id. at 9a). The court recognized that its decision "will create a financial drain upon the Social Security fund" (ibid.), but it dismissed this consideration on the ground that "[t]he economic aspects of this case * * cannot outweigh the importance of preserving fundamental constitutional values" (ibid.).

SUMMARY OF ARGUMENT

I.

As a matter of statutory construction, the exception to the pension offset provision incorporates the gender-based dependency test that existed in the Social Security Act prior to the decision in Califano v. Goldfarb, 430 U.S. 199 (1977). At the time of the Goldfarb decision, government retirees, unlike retirees in the private sector, were not required to have their retirement benefits offset against their Social Security spousal benefits. In light of Goldfarb, substantial numbers of government retirees became eligible for dual benefits that they had never ex-

pected to receive under the government pension and Social Security systems, and these "'windfall' benefits" (S. Rep. No. 95-572, 95th Cong., 1st Sess. 28 (1977)) threatened to impose a severe financial burden on the Social Security trust fund. To eliminate such windfall benefits and relieve the fiscal crisis faced by Social Security, Congress enacted the pension offset provision requiring that spousal benefits be reduced by the amount of the government pension.

In adopting this offset, however, Congress recognized the legitimate reliance interests of people who had retired or were about to retire and who had planned their retirements in the expectation of receiving both government pension benefits and unreduced Social Security spousal benefits. Congress therefore enacted the exception clause to exclude from the offset people who had retired or would retire within five years and who could meet the eligibility requirements "in effect and being administered in January 1977" (Section 334(g)(1) of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1546, 42 U.S.C. (Supp. V) 402 note).

This statutory language and purpose make clear that the exception clause incorporates the gender-based dependency test of pre-Goldfarb law. The statute seeks to protect the reliance interests of retirees who had made their retirement plans in accordance with pre-Goldfarb law but to offset the dual pension and spousal benefits of retirees who first became eligible for Social Security payments in light of Goldfarb. Furthermore, the only reasonable explanation for the selection of January 1977 as the operative date in the exception clause is that Congress, mindful of the March 1977 decision in Goldfarb, intended to distinguish between people eligible under pre-Goldfarb and post-Goldfarb standards. Nondependent men, who were ineligible for spousal benefits prior to March 1977, had no reliance interest to be protected.

In addition, it would entirely defeat Congress' intent to eliminate windfall benefits and reduce the burden on the Social Security trust fund if, as appellee contends, the pension offset exception were applicable to men as well as women without regard to dependency. Under appellee's reading, the exception would cover virtually all Social Security claimants who retire prior to December 1982, and essentially no one would be subject to the offset provision during that period. This interpretation would largely nullify the offset for five years and leave the Social Security system with the same financial difficulties that Congress intended the 1977 amendments to rectify. Moreover, appellee's interpretation, by treating the exception clause as nothing more than a specification of the effective date of the offset provision, both fails to attach any significance to the critical date of January 1977 in the exception and ignores the existence of a separate section expressly setting forth the effective date.

IL.

Although the exception clause incorporates the genderbased dependency standard of pre-Goldfarb law, it does not violate the equal protection guarantee of the Due Process Clause. The exception serves the legitimate and important governmental objective of protecting the reliance interests of retirees who had planned their retirements under existing law. The validity and significance of such reliance interests are well established in a number of doctrines that "recogni[ze] that statutory * * * rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." Lemon v. Kurtzman, 411 U.S. 192, 199 (1973) (plurality opinion). Given the unquestionable importance of Social Security benefits to people whose retirement plans were based on the extant provisions of the Act, Congress properly sought to "weigh[] the inequity" and "'avoid[] the "injustice or hardship"'" (Chevron Oil Co. v. Huson, 404 U.S. 97. 107 (1971); citation omitted) that enactment of the offset provision would otherwise have entailed for those who depended upon receiving unreduced spousal benefits.

In addition, the exception clause is substantially related to the achievement of this governmental objective. By incorporating the January 1977 eligibility standard, the exception clause is specifically and precisely tailored both to include people who could have expected to receive spousal benefits under pre-Goldfarb law and to exclude those who qualified for such benefits only as a result of the March 1977 decision in Goldfarb. Congress also limited the exception to a five-year transitional period in order to protect the reliance interests of people who were or soon would be retired and could not adjust their retirement plans to take account of the offset. And, finally, Congress rejected alternative approaches to the offset and exception provisions that it considered less desirable solutions to the problems confronting the Social Security system.

The statute thus represents a "reasoned analysis" by Congress (Mississippi University for Women v. Hogan, No. 81-406 (July 1, 1982), slip op. 7) of the need to accommodate the financial requirements of the Social Security trust fund and the reliance interests of retirees. Because it substantially serves an important governmental objective and is not based upon "'archaic and overbroad' generalizations" about the roles of men and women (Califano v. Goldfarb, supra, 430 U.S. at 211 (plurality opinion)), the exception clause does not violate equal protection.

III.

The severability clause in the exception provision states that, in the event the exception is held invalid in any respect, the offset shall remain in effect but the exception shall be considered invalid in its entirety. The purpose of this severability clause is to ensure "that if [the exception] is found invalid the pension-offset * * * would not be affected, and the application of the exception clause would not be broadened to include persons or circumstances that are not included within it" (H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 72 (1977); S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. 72 (1977)).

Contrary to the district court's conclusion, the severability clause is not "an unconstitutional usurpation of judicial power by the legislative branch of government" (J.S. App. 7a) or an "attempt to discourage the bringing of an action [to challenge the exception] by destroying standing" (id. at 8a). The issue of severability turns upon the intention of the legislature, and Congress was well within its recognized authority in expressing its intent in the severability clause.

Moreover, the validity of the severability clause does not bear on a plaintiff's standing to sue. Appellee was personally affected by operation of the gender-based statute, and this sufficed to give him standing. While the severability clause would govern the relief to which appellee might be entitled if he prevailed on the merits, it does not prevent him from seeking an adjudication of his rights.

In any event, even treating the question as one of standing, the severability clause does not deny standing to a plaintiff challenging the pension offset exception. First, a severability clause is an "aid in determining th[e] intent [of the legislature] " * * [and] not an inexorable command." Dorchy v. Kansas, 264 U.S. 286, 290 (1924). In the end, it is the courts' duty to determine what remains of a statute once a portion has been declared unconstitutional; while the severability clause in this case is a strong indication of congressional intent, the possibility of a judicial award of spousal benefits was not so remote or inconceivable that a plaintiff would be without a colorable claim to benefits sufficient to confer standing. Second, and more important, even if no spousal benefits could be granted in light of the severability clause, a plaintiff still would have standing to assert his right to be free from impermissible gender-based discrimination under the Social Security Act. Hence, by having the gender-based pension offset exception declared invalid, a plaintiff would have fully vindicated his Fifth Amendment right to equal protection.

Finally, the district court improperly intruded upon legislative prerogatives by extending the exception clause to nondependent men in contravention of the congressional directive that, if the gender-based exception provision were invalidated, "the entire exception would become inoperative so that the * * [offset] would be applied in all cases" (123 Cong. Rec. 39134 (1977) (remarks of Sen. Long)). It is for the legislature rather than the judiciary to make basic policy choices and allocate limited governmental funds. By distributing Social Security benefits in a way that Congress clearly foreclosed, the court exceeded proper judicial bounds and has reimposed the fiscal burden on the Social Security trust fund that Congress sought to avoid in 1977.

ARGUMENT

I. THE PENSION OFFSET EXCEPTION WAS IN-TENDED TO INCORPORATE THE GENDER-BASED DEPENDENCY STANDARD IN PRE-GOLDFARB LAW AND THEREFORE DOES NOT APPLY TO A NONDEPENDENT HUSBAND SUCH AS APPELLEE

Although appellee prevailed below on his constitutional arguments, he asserts in this Court (Mot. to Aff. 5-11) that the pension offset exception should be interpreted to apply to nondependent husbands and therefore to exempt him from the operation of the offset provision. Urging "the Court to construe the exception clause in a manner to avoid a constitutional issue" (id. at 7), he contends that "the exception clause should be construed as applicable to both male and female spouses without any reference to a gender-based dependency test" (ibid.). This contention is without merit. As the district court correctly understood, the exception clause incorporates the

⁷ See J.S. App. 3a, 4a, quoted at pages 7-8, supra. Most other courts that have addressed the issue have agreed that the exception clause incorporates the one-half support test in pre-Goldfarb law. See Caloger v. Harris, No. H-80-388 (D. Md. Mar. 25, 1981), slip

dependency standard in pre-Goldfarb law and thus does not exclude nondependent men from the offset provision.

Appellee relies upon the "maxim . . of statutory construction" that "statutes should be construed to avoid constitutional questions * * *." United States v. Batchelder, 442 U.S. 114, 122 (1979). This maxim is not an inexorable command to ignore the evident meaning of a statute, however, and a "restrictive interpretation should not be given a statute merely because * * * giving effect to the express language employed by Congress might require a court to face a constitutional issue." United States v. Sullivan, 332 U.S. 689, 693 (1948). Rather, such a construction is to be rendered "'only when [an alternative interpretation] is "fairly possible" from the language of the statute' " (United States v. Batchelder, supra, 442 U.S. at 122, quoting Swain v. Pressley, 430 U.S. 372, 378 n.11 (1977)). This rule does not "authorize[] a court in interpreting a statute to depart from its clear meaning" (United States v. Sullivan, supra, 332 U.S. at 693) or to "'pervert[] the purpose of a statute * * " or judicially rewrit[e] it" (Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964), quoting Scales V. United States, 367 U.S. 203, 211 (1961)). Since, as we show below, "the statutory meaning and congressional intent are plain" (City of Rome v. United States, 446 U.S. 156, 173 (1980)), the Court should "reject the appellfee's] suggestion that [it] engage in a saving construction and avoid the constitutional issues . . . "

op. 3; Duffy v. Harris, No. 79-386 (D.N.M. Oct. 23, 1979), slip op. 3; Miller v. Department of Health and Human Services, 517 F. Supp. 1192, 1194 (E.D.N.Y. 1981); Rosofsky v. Schweiker, 523 F. Supp. 1180, 1184 (E.D.N.Y. 1981), prob. juris. noted, 456 U.S. 959, appeal dismissed, 457 U.S. 1141 (1982); but see Webb v. Schweiker, 701 F.2d 81 (9th Cir. 1983), petition for cert. pending. No. 82-2094 (filed June 21, 1983), discussed at note 15, infra; Wachtell v. Schweiker, No. 80-8022-Civ-ALH (S.D. Fla. Jan. 26, 1982), appeal pending, No. 82-5552 (11th Cir. filed Apr. 30, 1982).

As this Court has emphasized:

[I]n all cases involving statutory construction, "our starting point must be the language employed by Congress," Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979), and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." Richards v. United States, 369 U.S. 1, 9 (1962). Thus, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982). Here, the statutory language "could not be more plain" (Lewis v. United States, 445 U.S. 55, 65 (1980)) that the pension offset exception does not apply to non-dependent men.

By its terms, the exception provides that the pension offset "shall not apply " " to an individual " " who * * * meets the requirements of th[e] subsection [under which spousal benefits are sought | as it was in effect and being administered in January 1977." Section 334(g) (1) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402 note (emphasis added). It cannot be doubted that in January 1977-which was prior to this Court's decision in Goldfarb-the Social Security Act required men, but not women, to prove that they were dependent on their spouses for one-half of their support in order to be eligible for spousal benefits. Compare former 42 U.S.C. 402(b) with former 42 U.S.C. 402(c). Accordingly, the plain language of the exception provision requires appellee to satisfy the one-half support standard if he is to come within the exception to the pension offset.8

^{*}In addition, as noted above (see page 5, supra) and as discussed further below (see pages 43-45, infra), the exception provision contains a severability clause, designed with this specific statute in mind, to apply in the event that the exception itself is

The legislative history confirms Congress' intent to incorporate the pre-Goldfarb gender-based dependency test in the exception clause. The offset provision originated in the Senate and, as explained by the Senate Finance Committee, had the following purpose:

Under present law, a woman can become entitled to spouse's or surviving spouse's benefits without proving dependency on her husband. As a result of a March 1977 Supreme Court decision [in Califano v. Goldfarb], a man can also become entitled to spouse's or surviving spouse's benefits without proving his dependency on his wife. * * * Under the social security program, an individual who is entitled to two benefits does not receive the full amount of both benefits. For example, if one is entitled to both a worker's benefit and a spouse's benefit, the full worker's benefit is paid first and then the amount (if any) by which the spouse's benefit exceeds the worker's benefit. This "dual-entitlement" provision prevents payment of dependents benefits to some persons not truly dependent. However, persons who receive civil service pensions based on their work in non-covered employment and are entitled to social security spouses' benefits, receive their spouses' benefits, in full, regardless of their dependency on the worker. This results in "windfall" benefits to some retired government employees.

The committee recommends that social security benefits payable to spouses and surviving spouses be reduced by the amount of any public (Federal, State, or local) retirement benefit payable to the spouse.

* In general, this should assure that dependents' social security benefits will not be paid to persons

not dependent on the worker.

found invalid. The only plausible basis for this unusual measure is that, contrary to appellee's contention, Congress intended the exception to incorporate, for purposes of the offset provision, the gender-based dependency standard that Goldfarb had held unconstitutional in a different context.

S. Rep. No. 95-572, 95th Cong., 1st Sess. 27-28 (1977) (emphasis added).

This problem of "windfall" benefits was greatly exacerbated by the *Goldfarb* decision, which substantially increased the number of government employees eligible for dual benefits under civil service pensions and the spousal provisions of the Social Security Act. The situation was explained by Robert M. Ball, a former Commissioner of Social Security:

Windfall benefits to husbands and widowers should

be prevented

The princip[al] effect of the March 1977 Supreme Court decisions granting benefits to husbands and widowers under the same conditions as those previously applicable to wives and widows (that is without a specific test of dependency) is to make eligible for social security benefits a substantial number of men who have worked for the federal government and whose wives have worked under social security. Very few of these men are in any real sense the economic dependents of their wives, and payment of benefits to them as dependents-in addition to paying them pensions earned in government employment—costs money and leads to unreasonable results. If the men were covered by social security as well as by the government retirement systems, the dual benefit provisions of the Social Security Act would almost always prevent them from receiving husbands' or widowers' benefits. * * * [T]he Social Security Act should be amended to prevent payment of benefits in the cases described.

The bill that became the Social Security Amendments of 1977 initially began in the House and did not contain an offset provision. However, the Senate substituted its proposal on a pending bill for the House version of the amendments (see 123 Cong. Rec. 36435, 36446 (1977) (remarks of Sen. Long); id. at 39132 (remarks of Sen. Long)), and the Senate offset provision, as modified in Conference to include the exception clause, was enacted into law. S. Rep. No. 95-572 is the Committee Report on the Senate substitute.

Social Security Financing Proposals: Hearings Before the Subcomm. on Social Security of the Senate Finance Comm., 95th Cong. 1st Sess. 117 (1977) (emphasis added) (hereinafter "Senate Hearings"); President Carter's Social Security Proposals: Hearings Before the Subcomm. on Social Security of the House Ways and Means Comm., 95th Cong., 1st Sess., Pt. 1, 158 (1977) (emphasis added) (hereinafter "House Hearings").10

Congress adopted the pension offset provision in an effort to reduce the tremendous financial burden on the Social Security trust fund arising from such "[w]indfall benefits" to the "substantial number of men" made newly eligible for spousal benefits by the Goldfarb decision. Congress estimated that the offset would prevent additional expenditures of \$190 million in fiscal year 1979 (S. Rep. No. 95-572, supra, at 28). And of these savings, approximately 90% was attributable to reductions in payments to nondependent husbands and widowers who had become entitled to spousal benefits by the decision in Goldfarb (S. Rep. No. 95-572, supra, at 81).

In enacting the offset provision, however, Congress became concerned about the elimination of Social Security benefits for people—primarily women—who had retired or soon would retire and who had planned their retirements in reliance on the prior law. This group of people had long been eligible to receive unreduced spousal benefits in addition to government pension benefits. Accordingly, Congress exempted from the offset provision "certain people who are already receiving pensions based on noncovered public employment (or who would be eligible for such pension within 5 years of the month of enactment) and who could have expected to receive social

¹⁶ See also 123 Cong. Rec. 37196 (1977) (remarks of Sen. Bellmon) ("[t]he bill would partially correct the double-dipping problem"); H.R. Rep. No. 95-702, 95th Cong., 1st Sees. 302 (1977) (minority views); House Hearings, supra, at 121 (statement of Wilbur J. Cohen); id. at 136, 140 (statement of Robert J. Myers); id. at 566 (statement of Rep. Fraser).

security benefits as dependents or survivors under the social security law as in effect on January 1, 1977." H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 72 (1977) (emphasis added); S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. 72 (1977) (emphasis added). As the Conference Report explained:

The managers are concered that there may be large numbers of women, especially widows in their late fifties, who are already drawing pensions, or would be eligible to draw them within 5 years of the date of enactment of this bill, based on their non-covered work and whose retirement income was planned for on the assumption of the availability of full wife's or widow's benefits under social security. Inclusion of this exception to the * * [offset] provision, reinforces its prospective nature and avoids penalizing people who are already retired, or close to retirement, from public employment and who cannot be expected to readjust their retirement plans to take account of the "offset" provision that will apply in the future.

H.R. Conf. Rep. No. 95-837, supra, at 72 (emphasis added); S. Conf. Rep. No. 95-612, supra, at 72 (emphasis added).¹¹

¹¹ See also S. Rep. No. 95-572, supra, at 81 (Congressional Budget Office analysis that, under the offset, "[t]hose husbands and widowers * * * who had newly become eligible for benefits as a result of the Goldfarb decision would lose their eligibility for those benefits if they had not filed before [the effective date of the amendments]"); Staff of Senate Comm. on Finance, 95th Cong., 1st Sess., Summary of H.R. 9346, the Social Security Amendments of 1977 as Passed by the Congress (P.L. 95-216) 7 (Comm. Print 1977) (hereinafter "Senate Comm. Print") ("To assure that persons who have been counting on these benefits for many years and who are now at or nearing retirement age will not be adversely affected, H.R. 9346 includes a transitional exception under which certain individuals will not have their social security benefits as spouses reduced by the amount of their public pension. This exception applies to those who * * * would qualify for spouses benefits under social security under the law as in effect and as administered in January 1977"); Staff of the House Comm. on Ways and Means, 95th Cong., 1st Sess.,

The same explanations were reiterated in the legislative debates on the Conference Report. For example, Representative Ullman, the Chairman of the House Committee on Ways and Means and principal manager of the bill in the House, clearly explained that claimants made eligible by the Goldfarb decision would be subject to the offset provision and would not be exempted by the exception clause:

The court decision put a lot of new people in. Those people who are newly brought in will come under the offset but those people who were eligible or who will be eligible in the next 5 years will not.

The Goldfarb decision made an awful lot of new people eligible for husbands' and widowers' benefits and what this [offset] provision does is it keeps the new people from going on, but for those people who were eligible under the old system, we have delayed the implementation of this for 5 years. Anybody who becomes eligible in 5 years, will get an exemption from this inclusion and will be able to draw both.

123 Cong. Rec. 39008 (1977) (emphasis added). Likewise, Representative Harris, in opposing the bill, objected that "it is unfair and discriminatory against men to require only men who receive public pensions to prove their

WMCP: 95-61, Summary of the Conference Agreement on H.R. 9846, at 5 (Comm. Print 1977) (hereinafter "House Comm. Print 95-61") ("[the] exception under which the offset provision would not apply * * * is to protect those persons who were expecting a social security dependency benefit based on their spouse's record"); Staff of the Subcomm. on Social Security of the House Ways and Means Comm., 95th Cong., 2d Sess., WMCP: 95-72, The Social Security Amendments of 1977 (Public Law 216, 95th Congress), at 5 (Comm. Print 1978) (same); id. at 28 ("exception * * * provides that the reduction will not apply to those who * * * could qualify for social security dependent's benefits if the law as in effect, and as being administered, in January 1977 remained in effect"). Congress estimated that the pension offset provision with the exception clause would save \$106 million in calendar year 1979 (Senate Comm. Print, supra, at 17; House Comm. Print 95-61, supra, at 10).

'dependency' * * *" (123 Cong. Rec. 39024 (1977)); as he noted:

The apparent rationale for the offset provision is that men who receive public pensions will get some sort of a "windfall" if they are also allowed to receive social security dependent's benefits, and that since they might not be "truly dependent," they must be able to "prove" their dependency in order to get a permanent exemption from the offset provision.

Ibid. See also id. at 39031-39032 (remarks of Rep. Bingham).

Finally, the clearest statement of congressional intent to incorporate pre-Goldfarb law into the exception clause is found in the summary of the Conference provisions presented by Senator Long, the Chairman of the Senate Finance Committee and principal manager of the bill in the Senate. As Senator Long explained, the exception clause was intended "to afford " * protection to those who anticipated receiving their spouses benefits prior to March 1977 without providing it also to those [who] would qualify only as a result of a March 1977 court decision * * *." 123 Cong. Rec. 39134 (1977) (emphasis added). The same explanation was repeated in the Senate Finance Committee's analysis of the legislation as enacted. See Staff of the Senate Comm. on Finance, 95th Cong., 1st Sess., Summary of H.R. 9346, the Social Security Amendments of 1977 as Passed by the Congress (P.L. 95-216) 7 (Comm. Print 1977) (hereinafter "Senate Comm. Print") 12

¹² This understanding of the exception clause is confirmed by the legislative history of the new offset provision recently enacted by Congress. See note 4, supra. The new provision exempts from the offset an individual who becomes eligible for a public pension prior to July 1983 if "that individual is dependent upon his or her spouse for one-half support." H.R. Conf. Rep. No. 97-985, 97th Cong., 2d Sess. 13 (1982). The House Conference Report, in comparing the new provision with Section 334(g), noted that Section 334(g) provides an exception only for those claimants who meet "the require-

Two fundamental conclusions emerge clearly from this legislative history, and they require rejection of appellee's construction of the pension offset exception. First, the offset provision was intended to eliminate the windfall benefits and relieve the financial burden on the Social Security trust fund that resulted from this Court's decision in Goldfarb. Second, mindful of the March 1977 decision in Goldfarb, Congress designed the exception clause—including its operative date of January 1977—to protect the reliance interests of people who had planned their retirements on the basis of pre-Goldfarb law but to exclude those whose claims for spousal benefits depended upon Goldfarb and who therefore could not have expected

ments for entitlement as they were in effect and being administered in January 1977" (H.R. Conf. Rep. No. 97-985, supra, at 13). As the Report summarized the governing 1977 law (id. at 12-13; emphasis added):

Prior to 1977, social security spouse's benefits were available only to men, who could meet a dependency test and to women, all of whom were presumed to be dependent. These provisions were declared in March 1977 (Califano V. Goldfarb) unconstitutional since they applied differently to men and women.

The law in January 1977 required men, but not women, to prove they were dependent on their spouses for at least one-half of their support in order t[o] qualify for the spouse benefit.

By contrast, the new pension offset provision "would be applied according to the pre-1977 law, except that it would apply to both men and women" (id. at 13; emphasis added). See also 128 Cong. Rec. H10674 (daily ed. Dec. 21, 1982) (remarks of Rep. Archer) (emphasis added) (Section 334(g) "exclude[d] from th[e] offset both women and dependent husbands who had reason to plan for such benefits under prior law"). These recent interpretations by Congress are "entitled to significant weight" (Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980); NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974)), and they are consistent with and reinforce the original congressional intent that Section 334(g) incorporate the pre-Goldfarb gender-based standard to allow only women and dependent men to come within the exception provision.

to receive retirement benefits from both the civil service and Social Security systems prior to that decision.¹³

Appellee's interpretation of the statute is irreconcilably at odds with both of these congressional purposes. By making men as well as women subject to the exception clause without regard to the one-half support requirement, appellee would largely vitiate the offset provision for the designated five-year period and would leave the Social Security system in the same fiscal plight that prompted congressional action in the first place; in fact, under appellee's position, the exception clause would apply to essentially all applicants prior to December 1982, and virtually no one would be subject to the offset provision during that period. Contrary to appellee's reading of the exception clause, there is no basis to "'imput[e] to Congress a purpose to paralyze with one hand what it sought to promote with the other." American Paper Institute, Inc. v. American Electric Power Service Corp., No. 82-34 (May 16, 1983), slip op. 18, quoting Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480, 489 (1947). Moreover, appellee construes the exception clause merely to defer the effective date of the offset provision until 1982. Nothing in the language or history of the 1977 amendments suggests this strained interpretation, however, and surely Congress would not have chosen the complex and circuitous formulation of the exception clause if its intention simply had been to specify the effective date of the statute. Such an "absurd" view of the exception clause is "to be avoided." United States v. Turkette, 452 U.S. 576, 580 (1981).34

¹⁸ See Rosofsky V. Schweiker, supra, 523 F. Supp. at 1185:

In choosing the January 1977 date Congress selected a month that preceded the March 1977 Supreme Court decisions in the Goldfarb, Jablon, and Silbowitz cases * * *. If Congress had wished to provide the exception to male applicants without regard to dependency, it would certainly have selected a control date after the March 1977 Supreme Court decisions, not before.

¹⁴ Furthermore, a separate provision of Section 334 expressly provides the effective date of the statute. See Section 334(f) of the

In addition, appellee's construction would frustrate the congressional purpose to protect the reasonable expectations of people whose retirement plans had been made in accordance with pre-Goldfarb law but to offset the dual pension and spousal benefits of those newly eligible for Social Security payments under Goldfarb. See, e.g., Watt v. Western Nuclear, Inc., No. 81-1686 (June 6, 1983), slip op. 20 ("[courts should] decline to construe · · · [statutory] language so as to produce a result at odds with the purposes underlying the statute [and i]nstead * * * [should] interpret the language of the statute in a way that will further Congress' overriding objective"). The legislative history speaks to this objective with unmistakable clarity, and the only reasonable explanation for Congress' selection of January 1977 as the critical date in the exception clause is to distinguish, in applying the offset provision, between people eligible under pre-Goldfarb and post-Goldfarb standards.16 Appellee suggests no other basis for the choice of the January

Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1546, 42 U.S.C. (Supp. V) 402 note ("[t]]he amendments made by this section shall apply with respect to monthly insurance benefits payable under title II of the Social Security Act for months beginning with the month in which this Act is enacted, on the basis of applications filed in or after the month in which this Act is enacted").

¹⁵ In Webb v. Schweiker, supra, the Ninth Circuit "believe[d]
* * that Congress did not intend to enact unconstitutional legislation" (701 F.2d at 82), and therefore it construed the exception clause to incorporate "only the constitutional requirements" (id. at 83; emphasis in original) of the Social Security Act in effect and being administered in January 1977. On this basis, and in light of Goldfarb, the court held that the exception clause does not require men to satisfy the one-half support test in order to avoid the pension offset. See also Mot. to Aff. 10-11. As we discuss below (see pages 27-42, infra), however, the exception is not rendered unconstitutional by the inclusion of the gender-based standard at issue here. Moreover, the court of appeals ignored the plain language and legislative history of the exception and the manifest congressional intent that underlies it.

1977 date and treats that provision as surplusage. Furthermore, he offers no reason why nondependent men—who were ineligible for Social Security benefits prior to March 1977—had any legitimate reliance interest that

Congress might have sought to protect.16

For these reasons, appellee's interpretation of the exception clause to encompass men and women equally would defeat the statutory scheme carefully and deliberately drawn by Congress and would expand the exception "at great expense to the taxpayer" (Rosofsky V. Schweiker, supra, 523 F. Supp. at 1188). Accordingly, the pension offset exception should be construed to incorporate a gender-based dependency standard that requires men but not women to meet the pre-Goldfarb one-half support test in order to a oid the offset provision.

II. THE GENDER-BASED DEPENDENCY STANDARD INCORPORATED IN THE PENSION OFFSET EXCEPTION DOES NOT VIOLATE THE DUE PROCESS CLAUSE

As shown above, the pension offset exception incorporates the pre-Goldfarb standard requiring men but not women to meet the one-half support dependency test. The

¹⁶ The district court faulted Congress for "presum[ing] that women would have relied upon the practices of the Social Security Administration, yet men would not have relied upon a decision of the Supreme Court" (J.S. App. 5a). See also Mot. to Aff. 12-13. But surely Congress was entitled to believe that the longstanding reliance interests-of both women and dependent men-under the Act were more deserving of protection than the new-found interests of nondependent men who only became eligible for spousal benefits in March 1977 as a result of the decision in Goldfarb. Moreover, and at all events, Congress accommodated the interests of these nondependent men by providing (see page 4, supra) that the offset would apply only to applications filed in or after the month of enactment of the amendments. Section 334(f) of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1546, 42 U.S.C. (Supp. V) 402 note. Thus, men who filed claims before December 1977 are not subject to the offset and therefore are eligible for full spousal benefits without regard to the one-half support test.

district court, while accepting this construction, invalidated the exception clause on the ground that such a gender-based dependency requirement violates the equal protection guarantee of the Due Process Clause of the Fifth Amendment. However, because the exception clause is not based on archaic and inaccurate sexual stereotypes but rather serves the important governmental objective of protecting the reliance interests of retirees, and because it is narrowly tailored and substantially related to the achievement of that objective, the gender-based dependency test incorporated in the exception does not violate due process.

A. A Gender-Based Classification Does Not Violate Due Process If It Substantially Serves An Important Governmental Objective Rather Than Reflecting Archaic And Inaccurate Sexual Stereotypes

As this Court has recognized, "[c]lassifications based upon gender * * have traditionally been the touchstone for pervasive and often subtle discrimination." Personnel Administrator v. Feeney, 442 U.S. 256, 273 (1979). See also, e.g., Orr v. Orr. 440 U.S. 268, 283 (1979). Often, these classifications merely "reflect[] archaic and stereotypic notions" (Mississippi University for Women v. Hogan, No. 81-406 (July 1, 1982), slip op. 6) and are based on "the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women" (id. at 7). For a statute to be valid, it "may not 'make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class," Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 469 (1981) (plurality opinion), quoting Parham v. Hughes, 441 U.S. 347, 354 (1979) (plurality opinion of Stewart, J.). Nor is it proper for a legislature, in adopting a gender-based classification, to "act 'unthinkingly' or 'reflexively and not for any considered reason." Rostker v. Goldberg, 453 U.S. 57, 72 (1981) (citation omitted).

At the same time, "[i]t is clear that '[g]ender has never been rejected as an impermissible classification in all instances.'" Rostker v. Goldberg, supra, 453 U.S. at 69 n.7, quoting Kahn v. Shevin, 416 U.S. 351, 356 n.10 (1974). Thus, the Constitution does not prohibit a "'gender classification [that] is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated.'" Rostker v. Goldberg, supra, 453 U.S. at 79, quoting Michael M. v. Sonoma County Superior Court,

supra, 450 U.S. at 469 (plurality opinion).

In applying these principles, the Court's "cases have held . . . that the traditional minimum rationality test takes on a somewhat 'sharper focus' when gender-based classifications are challenged." Michael M. v. Sonoma County Superior Court, supra, 450 U.S. at 468 (plurality opinion). Accordingly, to satisfy the applicable constitutional standard, "'classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Califano v. Webster, 430 U.S. 313, 316-317 (1977), quoting Craig v. Boren, 429 U.S. 190, 197 (1976). See also, e.g., Mississippi University for Women v. Hogan, supra, slip op. 5-8. Under this standard, "statutes * * * [have been] invalidated by this Court . . . that relied upon . . . simplistic, outdated assumption[s]" concerning gender and the role of women in society (id. at 8). Conversely, the Court has repeatedly upheld gender-based classifications that were supported by real economic or other relevant considerations.17

¹⁷ For example, in Califano v. Webster, supra, the Court sustained a Social Security formula that slightly favored women in the calculation of average monthly wages. The Court found the distinction constitutional because Congress had passed it in response to statistics indicating that it is more difficult for older women than older men to obtain reasonable employment and that older women, even if they find employment, are paid considerably lower wages. Similarly, in Kahn v. Shevin, supra, the Court upheid a state property tax exemption granted to widows but not widowers. Citing data indicating that

Califano v. Goldfarb, 430 U.S. 199 (1977), illustrates these doctrines. In Goldfarb, a five-to-four decision with no majority opinion, the plurality held that a genderspecific one-half support requirement, based as it was on "'old notions'" and "'archaic and overbroad' generalizations" about women, violated the Due Process Clause because it did not "'serve important governmental objectives'" and was not "substantially related to the achievement of those objectives." 430 U.S. at 210-211: citations omitted. Similarly, Justice Stevens, in his decisive concurring opinion, observed "that Congress never focused its attention on the question whether to divide nondependent surviving spouses into two classes on the basis of sex. . . It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate the terms 'widow' and 'dependent surviving spouse." 430 U.S. at 222 (Stevens, J., concurring). In light of this "automatic reflex" by Congress, Justice Stevens concluded that "this discrimination against a

women's median incomes were substantially below those for men, and recognizing that "[t]he disparity is likely to be exacerbated for the widow * * * [who] in many cases * * * will-find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer" (416 U.S. at 354; footnote omitted), the Court held that the differential treatment was justified. In Schlesinger V. Ballard, 419 U.S. 498 (1975), the Court upheld reductionin-force statutes that allowed women Naval and Marine officers a longer period of tenure than men officers before being mandatorily discharged. Because women officers were generally ineligible for sea duty, the classification "reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service." 419 U.S. at 508 (emphasis in original). Finally, the Court recently upheld all-male draft registration (Rostker V. Goldberg, supra) and the California statutory rape statute, under which only men can be criminally liable. Michael M. V. Sonoma County Superior Court, supra.

group of males is merely the accidental byproduct of a traditional way of thinking about females." Id. at 223.18

In the instant case the district court invalidated the exception clause on the basis of the Goldfarb decision. Goldfarb, however, arose in a much different context and does not compel the result reached by the court below. To the contrary, as we shall now demonstrate, the exception provision does not violate the Due Process Clause because it substantially advances an important governmental objective and is not based on archaic and discredited stereotypes.

B. The Exception Clause Substantially Serves The Important Governmental Objective Of Protecting The Reliance Interests Of Retirees

There can be no doubt that Congress, if it had wished, constitutionally could have reduced or eliminated the spousal benefits that existed in December 1977. See United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 174, 177 (1980); Hisquierdo v. Hisquierdo, 439 U.S. 572, 575 (1979); Califano v. Webster, supra, 430 U.S. at 321; Weinberger v. Salfi, 422 U.S. 749, 772 (1975); Flemming v. Nestor, 363 U.S. 603, 608-611 (1960); see also Frisbie v. United States, 157 U.S. 160, 166 (1895). In addressing the fiscal problems resulting from the Goldfarb decision, however, Congress did not adopt such a harsh measure. The question in this case is whether the line drawn by Congress—based on the reliance interests of retirees under pre-Goldfarb law—is impermissible.

The pension offset exception is, of course, genderneutral on its face. By its terms, it exempts from the offset provision "individual[s]" receiving or becoming eli-

¹⁸ Justice Stevens suggested, however, that he would have sustained the one-half support rule if it had been the result of a conscious "legislative decision to favor females in order to compensate for past wrongs, or a legislative decision that the administrative savings exceed the cost of extending benefits to nondependent widows." 430 U.S. at 222 (Stevens, J., concurring).

gible to receive government pensions within a five-year period who would have qualified for spousal benefits under the Social Security Act "as it was in effect and being administered in January 1977." Section 334(g)(1), 42 U.S.C. (Supp. V) 402 note. Thus, the exception applies to all individuals—men as well as women—who satisfy the January 1977 requirements for spousal benefits."

Although the exception is facially neutral, it does incorporate the gender-specific dependency standard of pre-Goldfarb law. Accordingly, we turn to the issue whether the exception clause "'serve[s an] important governmental objective[] and " " [is] substantially related to achievement of th[at] objective[].'" Califano v. Webster, supra, 430 U.S. at 317, quoting Craig v. Boren, supra, 429 U.S. at 197.

1. Protection of the Reliance Interests of Retirees Is an Important Governmental Objective

The background and purpose of the pension offset and exception provisions have been fully explained above. See pages 17-27, supra. At the time of the Goldfarb decision, government retirees, unlike those in the private sector, were not subject to an offset provision that would deduct their pension benefits from Social Security spousal payments. In light of Goldfarb, many government retirees became entitled to double benefits that they had never expected to receive under the government pension and Social Security systems, and these windfall payments threatened to cause a serious financial strain on the Social Security trust fund. To alleviate this burden, Congress imposed an offset on government pensions identical to the offset that existed for private employees. In so

¹⁹ As previously discussed (see pages 20-27, supra), the exception clause was designed to protect the reliance interests of people—husbapds and wives alike—who had retired or soon would retire and who had planned their retirements in accordance with pre-Goldfarb law. Indeed, equivalent to the actual provision, the exception could have been drafted explicitly in terms of this reliance interest. Cf. United States v. Ptasynski, No. 82-1066 (June 6, 1983), slip op. 12.

doing, however, Congress became concerned about government workers who were already or soon-to-be retired and who had planned their retirements on the assumption that they would receive spousal benefits under pre-Goldfarb law that would not be subject to an offset provision. To protect the reliance interests of these people, Congress enacted the exception clause to exempt from the offset all "individual[s]"—whether men or women—who were retired or would retire within five years and who could satisfy the pre-Goldfarb eligibility requirements as "in effect and being administered in January 1977."

The exception clause clearly furthers a legitimate and important governmental purpose: the protection of the legitimate reliance interests of retirees under pre-Goldfarb law. Cf. United States Railroad Retirement Board v. Fritz, supra, 449 U.S. at 177; id. at 180-182 (Stevens, J., concurring in the judgment); id. at 195 (Brennan, J., dissenting). There can be no serious question, as Congress specifically concluded, that it is a significant and salutary goal to secure the retirement plans of our Nation's workers who in good faith had long and reasonably relied on the provisions of the Social Security Act. No citation of authority is necessary to establish that to these workers the protection of their retirement plans was of the utmost importance, and Congress was not

²⁰ At the same time, of course, Congress enacted the offset provision to eliminate the windfall benefits and reduce the financial difficulties of the Social Security trust fund that arose from the decision in Goldfarb, and the exception clause cannot be assessed in isolation from the offset itself. The purpose of the offset was of major importance in view of the fact that the Social Security system is a contributory and self-sustaining insurance plan rather than a welfare program funded out of general revenues. See Califano v. Boles, 443 U.S. 282, 296 (1979); see also United States v. Lee, 455 U.S. 252, 259 n.9 (1982).

²¹ We do note that studies of the Social Security system confirm this self-evident proposition. For example, one prominent authority has found that "[f]or the great majority of Americans, the most important form of household wealth is the anticipated social security

required to ignore the serious hardships that could result from the unanticipated offset of spousal and pension benefits.

In addition to furthering the financial security of individual retirees and their families, the exception clause also promotes the collective interest of ensuring that citizens have confidence in the just and orderly processes of government. While not constitutionally required to do so, Congress surely was free to act in accordance with the principle that "'[g]reat nations, like men, should keep their word.'" Astrup v. INS, 402 U.S. 509, 514 n.4 (1971), quoting FPC v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting). See also United States v. Realty Co., 163 U.S. 427, 436-444

retirement benefits"; moreover, for most people, social security is viewed as a substitute for retirement savings, and those people will reduce private savings during their lifetime in anticipation of receiving retirement benefits. Feldstein, Social Security, Induced Retirement, and Aggregate Capital Accumulation, 82 J. Pol. Econ. 905, 905 (1974). See also C. Weaver, The Crisis in Social Security 185-187 (1982). Furthermore, in examining possible congressional responses to the Goldfarb decision, one commentator has expressly noted the need to protect the reliance interest of those nearing retirement:

Many couples have undoubtedly made retirement plans and adjusted the level of their private saving and investment in anticipation of retirement benefits from social security which include a special benefit for a spouse. An abrupt denial of benefits in these cases, even if the spouse who would have received them is shown to be not truly dependent on the other is clearly inequitable since the couple's savings and retirement plans would have been different had the spouse benefit not been anticipated. Thus, were it to be decided that wives should prove dependency in order to receive spouse benefits, a strong argument could be made for making such a change gradually so as to avoid inequities to couples approaching retirement who had anticipated that such benefits would be available to them and had made their retirement plans accordingly.

M. Flowers, Women and Social Security: An Institutional Dilemma 41 (1977).

(1896); United States Railroad Retirement Board v. Fritz, supra, 449 U.S. at 180 (Stevens, J., concurring in the judgment).

These two related interests—that of the individual in equitable treatment and that of the Nation in governmental regularity and fairness-are often implicated when a statute is amended, and they are reflected in the common use of "grandfather" clauses that make such amendments effective prospectively in recognition of the legitimate reliance on the prior law. This Court has repeatedly sustained such grandfather clauses. See, e.g., United States Railroad Retirement Board v. Fritz, supra, 449 U.S. at 177-179; New Orleans v. Dukes, 427 U.S. 297, 303-306 (1976); United States v. Maryland Savings-Share Insurance Corp., 400 U.S. 4, 6 (1970) (collecting cases); cf. Califano v. Webster, supra, 430 U.S. at 320-The exception provision in the Social Security Amendments of 1977 is a similar kind of grandfather clause that "reinforces * * * [the] prospective nature [of the offset]" (H.R. Conf. Rep. No. 95-837, supra, at 72; S. Conf. Rep. No. 95-612, supra, at 72). That the exception clause includes not only those who had retired but also those who would retire within five years does not alter the basic character of the clause, since, of necessity in the area of retirement, a transitional period was required to "avoid[] penalizing people who are * * * close to retirement * * * and who cannot be expected to readjust their retirement plans to take account of the 'offset' provision that will apply in the future" (H.R. Conf. Rep. No. 95-837, supra, at 72; S. Conf. Rep. No. 95-612, supra, at 72).

Moreover, this Court has recognized the legitimacy and importance of reliance interests in a number of doctrinal areas involving a change in the law—for example, the retroactivity of a new decision, the propriety and ex-

²² See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co., No. 81-150 (June 28, 1982), slip op. 37-38 (plurality opinion); United States v. Peltier, 422 U.S. 581, 541-542 (1975);

tent of retrospective judicial relief." the applicability of a statutory amendment to a pending case,24 and the immunity of governmental officials who acted in accordance with prior law.38 At bottom, all of these doctrines require "reconciling the * * * interests reflected in a new rule of law with reliance interests founded upon the old * * " (Lemon v. Kurtzman, supra, 411 U.S. at 198 (plurality opinion)), and they "recogni[ze] that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct" (id. at 199). Indeed, in order to allow a proper transition to a new rule of law, this Court on occasion has stayed a judgment of unconstitutionality and expressly allowed an invalid statute to remain in effect for a specified period of time.26 Congress, no less than the judiciary, is entitled to "weigh[] the inequity" (Chevron Oil Co. v. Huson, supra, 404 U.S. at 107) resulting from a change in law and to limit the new rule in a way that avoids "'injustice or hardship'" (ibid.; citation omitted).27

Chevron Oil Co. V. Huson, 404 U.S. 97, 106-107 (1971); see also Griffin v. Illinois, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring in the judgment).

 ²³ See, e.g., Los Angeles Department of Water and Power V.
 Manhart, 435 U.S. 702, 721-723 (1978); Lemon V. Kurtzman, 411
 U.S. 192, 198-199, 203, 206-208 (1973) (plurality opinion).

²⁴ See, e.g., Bradley V. Richmond School Board, 416 U.S. 696, 717, 720-721 (1974).

²⁵ See Procunier v. Navarette, 434 U.S. 555, 565 (1978).

²⁶ See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., supra, slip op. 38 (plurality opinion); Buckley v. Valeo, 424 U.S. 1, 142-143 (1976).

Themon v. Kurtzman is especially pertinent here. In that litigation, a state statute providing aid to a ctarian schools was invalidated under the Establishment Clause. See Lemon v. Kurtzman, 403 U.S. 602 (1971) (Lemon I). Thereafter, the district court allowed the state to reimburse the schools for expenses they had incurred in reliance on the statute prior to the decision in Lemon I. In Lemon v. Kurtzman, 411 U.S. 192 (1973) (Lemon II), this

Finally, the legitimacy and importance of the reliance interests protected by the exception clause are underscored by the decision in United States Railroad Retirement Board v. Fritz, supra. In Fritz, this Court rejected an equal protection challenge to a grandfather provision in the Railroad Retirement Act of 1974, 45 U.S.C. (& Supp. V) 231, that, like the present case, exempted specified classes of employees from the elimination of certain dual retirement benefits. In sustaining the rationality of the statute (449 U.S. at 174, 177), the Court noted that Congress could properly protect the economic "expectations" (id. at 177) of certain classes of employees by means of a grandfather provision, and that the applicability of such a grandfather provision could be limited to those employees having the "greater equitable claim to [unreduced] benefits" (id. at 178). Congress has sought to achieve the same results here. As in Fritz, Congress acted to eliminate dual retirement benefits while at the same time protecting those present and future retirees who legitimately relied on the receipt of such benefits. In both instances Congress attempted to preserve the integrity of the federal treasury while recognizing the relative equities of those affected by the change in the law. The congressional objectives behind the exception clause in this case, implemented through a genderbased classification to reflect the relevant reliance interests, are neither less justifiable nor less substantial than those upheld in Fritz. See also United States v. Realty Co., supra, 163 U.S. at 436-444.

Court affirmed the district court's order over the dissent of Justice Douglas that such reimbursement was as much a violation of the Establishment Clause as the payment in Lemon I. In the instant case, as in Lemon II, there was a legitimate and important need for a brief transition period to accommodate reliance interests formed under the prior law even though such a transition might be said to be, in some senses, a continuation of the unconstitutional statute. See also Northern Pipeiine Construction Co. v. Marathon Pipe Lina Co., supra, slip op. 39 (plurality opinion); Buckley v. Valeo, supra, 424 U.S. at 142-148.

Accordingly, in light of the well-established recognition of reliance interests in the law and the significance of Social Security benefits to people who had planned their retirements in accordance with pre-Goldfarb rules, it is clear that the exception clause was designed to serve the legitimate and important governmental objective of protecting the reliance interests of retirees.

2. The Exception Clause Is Substantially Related to Achievement of the Objective of Protecting the keliance Interests of Retirees

Given that the protection of the reliance interests of retirees is a legitimate and important governmental objective, it must be determined whether the exception clause is "substantially related to [the] achievement of th[at] objective[]." Califano v. Webster, supra, 430 U.S. at 317. "The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." Mississippi University for Women v. Hogan, supra, slip op. 7.

There can be little doubt in this case that the exception clause is substantially related to Congress' objective. By incorporating the January 1977 eligibility standard for those who were or soon would be retired, the exception clause is specifically and precisely tailored to the group that made retirement plans under pre-Goldfarb law. People within this group are the only ones who could have expected to retire with unreduced benefits in accordance with the Social Security program prior to Goldfarb, and their reliance interests are protected by the exception to the offset. Conversely, people not eligible under the January 1977 standard had no such expectation but rather qualified for spousal benefits only as a result of the Goldfarb decision; these people, having no reliance interest to be protected, are excluded from the exception, and thus the offset provision is applicable to eliminate their

dual benefits.²⁸ See Michael M. v. Sonoma County Superior Court, supra, 450 U.S. at 469 (plurality opinion), quoting Rinaldi v. Yeager, 384 U.S. 305, 309 (1966), and Tigner v. Texas, 310 U.S. 141, 147 (1940) ("the 'equal protection' clause * * * does not require things which are different in fact * * * to be treated in law as though they were the same"); see also Anderson v. Celebrezze, No. 81-1635 (Apr. 19, 1983), slip op. 20.

In addition, the exception clause incorporating the pre-Goldfarb standard is limited to a five-year period. In light of the nature of retirement planning, Congress appropriately concluded that this was a reasonable length of time that "avoids penalizing people who are already retired, or close to retirement, from public employment and who cannot be expected to readjust their retirement plans to take account of the 'offset' provision that will apply in the future" (H.R. Conf. Rep. No. 95-837, supra, at 72; S. Conf. Rep. No. 95-612, supra, at 72). By confining this provision to a brief "transitional exception" (123 Cong. Rec. 39134 (1977) (remarks of Sen. Long)), Congress adopted a narrowly tailored and focused means of achieving its objectives.

Furthermore, the exception clause clearly represents a "reasoned analysis" (Mississippi University for Women v. Hogan, supra, slip op. 7) by Congress of the situation confronting the Social Security system. Cf. Rostker v. Goldberg, supra, 453 U.S. at 74 ("[t]he issue was considered at great length, and Congress clearly expressed its purpose and intent"); compare Califano v. Westcott, 443 U.S. 76, 87 (1979) (the provision at issue "escaped virtually finnoticed" by Congress). The legislative record discussed above (see pages 17-27, supra) shows that Con-

²⁸ We again note that the offset itself does not apply to anyone, including nondependent men, who filed a valid application for spousal benefits prior to December 1977. See page 4 and note 16, supra. Any reliance interests of these people thus have been accommodated in the starting date of the offset provision rather than through the exception clause.

gress focused directly on the financial problem caused by the Goldfarb decision, solved that problem by enacting a pension offset provision comparable to the offset that already applied to private-sector employees, and then included a carefully limited exception clause to prevent the offset from unfairly affecting a discrete class of Social Security recipients. Taken together, the offset provision and exception clause constitute a reasonable solution to

a complex and difficult problem.

Indeed, in adopting the offset and exception provisions. Congress considered and rejected alternative approaches that it deemed less desirable. For example, the House version of the 1977 amendments recommended that a sixmonth HEW study on equal treatment for men and women under Social Security "[i]nclude[] * * various proposals to mitigate the cost impact of the recent Goldfarb decision on the system." Staff of the House Comm. on Ways and Means, 95th Cong., 1st Sess., WMCP: 95-57 Summary of the Principal Provisions of H.R. 9346, The Social Security Financing Amendments of 1977 As Passed By the House 4 (Comm. Print 1977). See also House Hearings, supra, at 121 (statement of Wilbur J. Cohen). This suggestion for further study ultimately was rejected in favor of immediate action to eliminate windfall benefits and ease the financial burden on the Social Security trust fund. As another alternative, the Carter administration proposed a modified dependency test that would be applicable to men and women equally and would require the spouse with the lower income for the three-year period prior to retirement to prove dependency on the other spouse. See House Hearings, supra, at 5, 10, 67-68; Senate Hearings, supra, at 44, 45. Although this proposal was intended "to mitigate the cost impact of" Goldfarb (House Hearings, supra, at 10) and would have resulted in far lesser payments of dependents' benefits than would a pension offset (Senate Hearings, supra, at 45), it, too, was rejected for the offset after Congress specifically considered the two measures. See S. Rep. No. 95-572, supra, at 28; House Hearings, supra, at 67-68; see also id. at 121.29

29 As the Senate explained:

Consideration was given to requiring claimants to prove their dependency on the worker before entitling them to spouses' benefits. However, a dependency test would be subject to manipulation. For example, a government employee with earnings higher than those of his wife could qualify for a social security spouse's benefit by allowing a few months to intervene between the date of his retirement and the effective date of his pension. Also, a dependency test could deny spouses' benefits in situations where it would seem undesirable to deny such benefits. For example, a woman might, in fact, be dependent upon her husband for most of her life and might have earned little or nothing in the way of retirement income protection in her own right and yet be denied benefits if a dependency test were implemented. This could occur if her husband became ill shortly before reaching retirement age, thus forcing a temporary reversal of their usual dependency situation. Additionally, a dependency test would require substantial numbers of persons to provide information with regard to their total income in order to establish entitlement, a significant departure from present practice where income is not generally a factor in entitlement. Making such determinations would also create administrative difficulties. For these reasons, the committee believes an offset is preferable to a dependency test.

S. Rep. No. 95-572, supra, at 28.

The district court, in rejecting "administrative convenience" as a justification for the gender-based standard incorporated in the exception clause (J.S. App. 6a) and suggesting that a dependency test would have been preferable (id. at 5a), clearly misunderstood the basis for Congress' action. First, the problem of "administrative difficulties" cited in the Senate Report was only one of several reasons that led Congress to reject a dependency requirement. Moreover, this Court has never suggested, as the district court did, that administrative considerations are either irrelevant or illegitimate as justifications for a gender-based statute; quite the contrary, the Court has acknowledged that there "may be * * levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny under the Equal Protection Clause" (Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 152 (1980)). Administrative practicalities are especially significant

In enacting the pension offset exception, therefore, Congress was not motivated by a sexist animus, nor did it intend to effectuate and perpetuate discredited stereotypes regarding the proper roles and perceived frailties of women. Rather, the exception clause is substantially related to the protection of the reliance interests of retirees under pre-Goldfarb law and is narrowly drawn to achieve that unquestionably legitimate governmental objective. Moreover, Congress carefully focused on the offset provision and exception clause, and it deliberately chose that approach over other alternatives. In these circumstances, the constitutionality of the exception clause should be sustained.³⁰

with respect to the Social Security Act. See, e.g., Heckler v. Campbell, No. 81-1983 (May 16, 1983), slip op. 2 n.2, 10; Mathews v. Lucas, 427 U.S. 495, 509-510 (1976); Weinberger v. Salfi, 422 U.S. 749, 781-785 (1975). Finally, the district court overstepped proper judicial bounds in so lightly casting aside, without "[t]he customary deference accorded the judgments of Congress," the policy choices "specifically considered" by Congress. Rostker v. Goldberg, supra, 453 U.S. at 64.

³⁰ As is evident from the foregoing discussion, the decision in Califano v. Goldfarb, invalidating the one-half support test as a substantive rule of eligibility, does not require that the exception clause in this case be held unconstitutional. The gender-based classification incorporated in the exception clause was a conscious and deliberate enactment by Congress to further a legitimate and important objective that was unrelated to the presumed dependency of women or other sexual stereotypes; in contrast, Goldfarb involved an "'archaic and overbroad' generalization[]" about the roles of men and women (430 U.S. at 210-211 (plurality opinion)) and was an "accidental byproduct of a traditional way of thinking about females" on which "Congress never focused its attention" (id. at 222-223) (Stevens, J., concurring)). Moreover, and again unlike Goldforb, the exception clause is narrowly tailored and substantially related to the achievement of the congressional objective. The gravamen of the exception is not gender but rather the historical fact of reliance-by men as well as women-on prior law, and the exception is carefully limited to that purpose.

III. THE SEVERABILITY CLAUSE IN SECTION 334 IS CONSTITUTIONAL AND, IN THE EVENT THE PENSION OFFSET EXCEPTION IS INVALIDATED, RENDERS THE OFFSET APPLICABLE WITHOUT EXEMPTION

In addition to containing the pension offset exception, Section 334(g) also includes a severability clause:

If any provision of this subsection [subsection (g)], or the application thereof to any person or circumstance, is held invalid, the remainder of this section [Section 334] shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid.

Section 334(g) (3) of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1547, 42 U.S.C. (Supp. V) 402 note. The district court struck down this severability clause as "an unconstitutional usurpation of judicial power by the legislative branch of the government" (J.S. App. 7a) and an "attempt to discourage the bringing of an action [to challenge the exception] by destroying standing" (id. at 8a). Furthermore, having invalidated the severability clause, the court ordered that the exemption to the offset be extended to men as well as women without regard to dependency, notwithstanding that such relief would "create a financial drain upon the Social Security fund" (id. at 9a).

Contrary to the district court's ruling, the severability clause is not an unconstitutional usurpation of judicial authority but rather a wholly proper statement of congressional intent on the meaning and application of the statute. Moreover, the severability clause does not unconstitutionally divest a plaintiff of standing to challenge the validity of the exception provision. Finally, by ignoring the clear congressional intent behind the severability clause and extending Social Security benefits to a class of claimants precluded by statute from receiving them, the district court has arrogated to itself the powers rightly belonging to Congress and has encroached upon

the legislative province of making policy choices and al-

locating limited funds.

On its face, the severability clause in Section 334(g) (3) provides that "[i]f any provision of . . subsection [(g), which includes the exception provision] . . is held invalid, the remainder of . . section [334, which includes the offset] shall not be affected thereby, but the application of * * * subsection [(g)] to any other persons or circumstances shall also be considered invalid." By this section, Congress expressed its intention that, in the event the exception provision were held unconstitutional, (1) the offset provision would "not be affected thereby" and would continue in full force and effect, and (2) the exception provision would "be considered invalid" in all respects and in all applications, thereby leaving the offset to stand without exemption and foreclosing the possibility that the exception would be expanded to include additional people beyond those intended by Congress.

The legislative history confirms this congressional understanding that, if the exception provision were invalidated, the severability clause would both preserve the offset intact and excise rather than enlarge the exception. This purpose was explained in the Conference Re-

ports in unmistakable terms:

A separability clause is included for the exception clause * * so that if [the exception] is found invalid the pension-offset * * would not be affected, and the application of the exception clause would not be broadened to include persons or circumstances that are not included within it.

H.R. Conf. Rep. No. 95-837, supra, at 72; S. Conf. Rep. No. 95-612, supra, at 72. Likewise, Senator Long, in submitting the Conference Report to the Senate for approval, made clear that ["i]n the event the courts find it impermissible to afford this protection [in the exception provision] to those who anticipated receiving their spouses benefits prior to March 1977 without providing it also to those who would qualify only as a result of a

March 1977 court decision, the bill provides that the entire exception would become inoperative so that the reduction in benefits would be applied in all cases." 123 Cong. Rec. 39134 (1977) (emphasis added). Senator Long's explanation was subsequently repeated in the Senate Finance Committee's analysis of the final bill. See Senate Comm. Print, supra, at 7.

Nothing in the severability clause or its legislative history suggests any "unconstitutional usurpation of judicial power by the legislative branch of the government" (J.S. App. 7a). To the contrary, Congress acted well within its recognized authority in defining with precision the scope of the statute it was enacting in the event one portion were held invalid. The issue of severability turns on whether "the Legislature would not have enacted those provisions which are within its power, independently of that which is not." Buckley v. Valeo, 424 U.S. 1, 108 (1976), quoting Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932). See also, e.g., INS v. Chadha, No. 80-1832 (June 23, 1983), slip op. 10-11: United States v. Jackson, 390 U.S. 570, 585 n.27 (1968); Crowell v. Benson, 285 U.S. 22, 63 (1932), Severability involves "a question of interpretation and of legislative intent. * * The task * * * [is to] determin[e] the intention of the * * * legislature * * *." Dorchy v. Kansas, 264 U.S. 286, 290 (1924). See also Williams v. Standard Oil Co., 278 U.S. 235, 241 (1929). And where, as here, "we are seeking to ascertain the congressional purpose [regarding severability], we must give heed to [an] explicit declaration [by Congress]." Electric Bond & Share Co. v. SEC, 303 U.S. 419, 434 (1938).

In this case, "Congress has defined its intent as to separability." Electric Bond & Share Co. v. SEC, supra, 303 U.S. at 434; see also Califano v. Westcott, 443 U.S. 76, 95 (1979) (Powell, J., concurring in part and dissenting in part). Section 334(g)(3) plainly expresses Congress' view that, if the exception clause were unenforceable in

any way, the offset provision should remain in effect and the exception should be eliminated in its entirety. In other words, Congress unambiguously stated that it would not have enacted the exception clause at all-thus applying the offset provision to all individuals without qualification-if it "had been advised of the invalidity of part." Hill v. Wallace, 259 U.S. 44, 71 (1922); cf. Brookins v. O'Bannon, 699 F.2d 648, 655 (3d Cir. 1983) (nonseverability clause in a state welfare statute was not an unlawful burden on the right to judicial redress because the clause "does no more than express the legislature's intention to repeal [the statute] unless [it] * * * is enforceable"). That Congress, through the severability clause, removed any "hesitation or doubt" that might otherwise have existed in this regard (Hill v. Wallace, supra, 259 U.S. at 71) raises no separation-of-powers issue.31

The district court, however, conceived the severability clause to be an effort by Congress "to mandate the outcome of any challenge to the validity of the exception by making such a challenge fruitless" (J.S. App. 8a) and thus an "attempt to discourage the bringing of an action by destroying standing" (ibid.). We submit that there is simply no basis for the district court to ignore the evident and legitimate purpose of the severability clause as discussed above or to impugn the integrity and good faith of Congress.

²¹ The district court also found "a conflicting expression of Congressional intent" between "Congress' avowed intent to protect the expectation and reliance interests of" retirees and the directive in the severability clause to "destroy the five-year grace period, along with the remainder of the pension offset exception, if any part of the exception is held invalid" (J.S. App. 8a). The text and history of the statute, however, plainly reveal the congressional judgment that the protection of reliance interests is subsidiary to the elimination of dual benefits and the reduction of social security costs. The severability clause evidences Congress' considered conclusion that, should the courts determine that the pension offset exception cannot be limited to the class it defined, reliance and expectation interests must give way to the overriding policy underlying the pension offset provision of the 1977 legislation.

We also submit that the validity of the severability clause does not bear on a plaintiff's standing to sue and that the issue cannot properly be analyzed in those terms. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. * * * In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III." Warth v. Seldin, 422 U.S. 490, 498 (1975). There can be no doubt in this case that appellee, as a person subject to the offset and not eligible for the statutory exception. has asserted "a distinct and palpable injury to himself" (id. at 501) and "'alleged such a personal stake in the outcome of the controversy as to assure thie necessary concrete adverseness." Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978), quoting Baker v. Carr. 369 U.S. 186, 204 (1962); see Orr v. Orr, 440 U.S. 268, 272-273 (1979). While the validity of the severability clause would limit the relief that could be granted appellee if he prevailed on the merits of his cause of action, it does not prevent him from presenting his claim to the court for adjudication. See Davis v. Passman, 442 U.S. 228, 239 n.18 (1979).

At all events, even viewing the issue as one of standing, the district court incorrectly concluded that the severability clause could deprive appellee of standing to challenge the validity of the exception clause. The court's conclusion was in error for two independent reasons.

First, the existence of the severability clause does not so incontrovertibly foreclose appellee's claim to spousal benefits that he lacks standing. While Section 334(g)(3) is a strong indication of congressional intent, it is, like all severability provisions, no more than an "aid in determining that intent * * * [and] not an inexorable command." Dorchy v. Kansas, supra, 264 U.S. at 290. In the end, "[t]he task of determining the intention of the * * legislature in this respect * * rests * * upon

the * * * court" (ibid.). For example, it is possible that a court might construe the clause not to apply in the particular circumstances of a given case. In addition, a court could—as the district court did here—hold the clause unconstitutional. In either event, appellee would become entitled to spousal benefits. Although these outcomes might be thought unlikely in view of the language, history, and purpose of the severability clause, they are not so inconceivable or remote that appellee was without a colorable claim to benefits. Cf. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970). At the time this lawsuit was filed, all that could be said was that appellee "'may or may not ultimately win' " such relief. Orr v. Orr, supra, 440 U.S. at 273, quoting Stanton v. Stanton, 421 U.S. 7, 17 (1975). This possibility of a judicial remedy awarding appellee spousal benefits was sufficient to confer standing.

Second, the premise of the district court's conclusionthat appellee must be entitled to monetary relief in order to have standing here-is unfounded. The right advanced by appellee in challenging the exception provision is the right to the equal protection of the laws as guaranteed by the Due Process Clause. More specifically, in the context of this litigation, it is the right not to be subject to an impermissible gender-based classification but instead "to be treated equally with other [applicants] as regards * * * benefits." Califano v. Goldfarb, supra, 430 U.S. at 212 (plurality opinion); cf. Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 247 (1931). The Due Process Clause, however, does not ensure a particular substantive outcome or entitle appellee to spousal as well as pension benefits from the government; appellee has no constitutional right to the windfall of a dual allowance. By obtaining a judicial decree that the exception provision violates the Due Process Clause, appellee vindicated his constitutional right in its entirety and achieved the "personal benefits" (J.S. App. 8a) of being eligible for spousal benefits on the same terms as women.³² Hence, the severability clause would not destroy appellee's standing to challenge the exception provision even if it were assumed from the outset of the case that the exception is not severable and therefore that appellee would not be entitled to receive spousal benefits.²³

This Court has often considered the "inherent problem of challenges to underinclusive statutes" (Orr v. Orr, supra, 440 U.S. at 272) and the "remedial alternatives" of "extension" and "nullification" (Califano v. Westcott, supra, 443 U.S. at 89). See also, e.g., Welsh v. United States, 398 U.S. 333, 361-367 (1970) (Harlan, J., concurring in the result). In no case, however, has the

³² In effect, appellee is in no different position than if judicial relief were limited to a declaratory judgment or if monetary damages were barred by the doctrine of sovereign immunity. In those circumstances as in the present one, the question of remedy would neither affect appellee's standing to litigate the issue whether his personal right to due process has been violated nor deprive a federal court of jurisdiction to decide that issue. Cf. United States v. Testan, 424 U.S. 392, 399-407 (1976); Steffel v. Thompson, 415 U.S. 452, 462-463, 466-472 (1974); Powell v. McCormack, 395 U.S. 486, 517-518 (1969); Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240-241 (1937).

²³ The district court also asserted (J.S. App. 8a) that the severability clause would eliminate the incentive of prospective plaintiffs to contest the validity of the exception. But many features of litigation-the requirement of exclusive venue in an inconvenient forum, the unavailability of attorney's fees, or limitations on relief such as sovereign immunity-may affect a plaintiff's willingness to file suit; a district court's assessment of the adequacy of incentives to sue is simply not a legitimate ground on which to strike down an otherwise valid statute. Moreover, we disagree that interested litigants lack an incentive to question the exception provision in light of the severability clause. If a court were to hold that the line drawn by Congress in Section 334(g)(1) was unconstitutional, Congress would have the opportunity to reconsider the matter and extend benefits without regard to dependency; indeed, such reconsideration is made more likely if the judicial relief denies benefits to a class that Congress clearly intended to be eligible, and especially so where, as here, Congress on its own has returned to the statute on two occasions subsequent to the original enactment (see note 4, supra).

Court even suggested that it would "den[y] a plaintiff standing on [the] ground" that the nullification rather than the extension of benefits would "thwart[]" the plaintiff's claim (Orr v. Orr, supra, 440 U.S. at 272). Rather, in cases from state courts involving the constitutionality of state provisions, this Court consistently has remanded for consideration of the relief issue as a matter of state law in light of the federal holding that the provision was substantively invalid. See, e.g., Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 152-153 (1980): Orr v. Orr, supra, 440 U.S. at 272-273, 283-284; Stanton v. Stanton, 421 U.S. 7, 17-18 (1975), 429 U.S. 501 (1977); Skinner v. Oklahoma, 316 U.S. 535, 542-543 (1942). These decisions indisputably recognize that the issue of relief-that is, the issue of denial or extension of benefits to correct the gender-based discrimination-is not part of the federal constitutional right to equal protection. And at least one federal court has ordered the denial rather than the extension of benefits to remedy an unconstitutional gender-based dependency test in the Social Security Act, without suggesting that the plaintiff was thereby deprived of standing or that his constitutional rights were rendered nugatory. See Moss v. Secretary of HEW, 408 F. Supp. 403, 411-415 (M.D. Fla. 1976).

The severability clause in Section 334(g) (3) presents a compelling case for the invalidation, rather than the extension, of the exception provision. See INS v. Chadha, supra, slip op. 11. And contrary to the district court's conclusion, the severability clause does not usurp the authority of the judiciary. Quite the opposite, it is the district court that has improperly intruded upon the powers of a co-equal branch of government. "Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts. The discretion belongs to Congress .""

Mathews v. De Castro, 429 U.S. 181, 185 (1976) (citation omitted). See also, e.g., Califano v. Torres, 435 U.S.

1, 5 (1978); Maher v. Roe, 432 U.S. 464, 479-480 (1977). Thus, "[w]henever a court extends a benefits program to redress unconstitutional underinclusiveness, it risks infringing legislative prerogatives" (Califano v. Westcott, supra, 443 U.S. at 92). Here, the district court's extension of the exception provision to appellee flies squarely in the face of the clear language and history of Section 334(g) and, in disregard of the plain congressional intent, requires the Social Security trust fund to continue to bear the substantial burden of windfall payments to people ineligible for benefits under the Act. See Hill v. Wallace, supra, 259 U.S. at 71; Califano v. Westcott, supra, 443 U.S. at 94 (Powell, J., concurring in part and dissenting in part).

In sum, by realigning Social Security benefits in a way that Congress clearly foreclosed, the district court failed to respect and abide by the considered policy choice of a "democratic branch[] of the Government" (Califano v. Westcott, supra, 443 U.S. at 93). Instead, by extending the exception clause to all claimants without regard to dependency or reliance interests, the district court effectively has nullified the offset provision and thus recreated the fiscal problem that Congress sought to avoid in 1977. Accordingly, if the exception provision is held to be unconstitutionally underinclusive, it should be invalidated in its entirety, as Congress intended, rather than extended to appellee and the class he represents.

³⁴ The Social Security Administrative estimates that the 1977 offset provision with the exception clause reduced Social Security expenditures by more than \$190 million for the period of calendar years 1978-1982 and will save in excess of \$900 million over the period 1983-1986.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

Attorneys

REX E. LEE
Solicitor General

J. PAUL McGrath
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

MARK I. LEVY
Assistant to the Solicitor General

ROBERT S. GREENSPAN
CARLENE V. McIntyre

JUNE 1983

No. 82-1050

ALEXALORS L STEINS,

Supreme Court of the United States

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

VS.

ROBERT H. MATHEWS, ET AL.,

Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

BRIEF FOR APPELLEES

ROBERT W. BUNCH
JOHN R. BENN
PECR. SLUSHER & BUNCH
118 West Dr. Hicks Boulevard
Florence, Alabama 35630
(205) 766-4490

BRUCE K. MILLER Western New England College-School of Law Springfield, Massachusetts 01119 (413) 782-3111

Attorneys for Appellees

QUESTIONS PRESENTED

- 1. Whether the exception clause of the government pension offset provision which incorporates by reference the gender-based dependency requirement previously held unconstitutional by this Court's decision in Califano v. Goldfarb: A) should be interpreted without reference to that requirement, or, if not, B) violates the equal protection component of the due process clause of the fifth amendment.
- Whether a severability clause which precludes all persons harmed by an unconstitutional statutory classification from securing judicial relief is an unconstitutional obstruction of the exercise of judicial review.

TABLE OF CONTENTS

Que	stions Presented
Tabl	le of Authorities
	stitutional Provision Involved
Legi	slative Provisions Involved
Stat	ement
Sum	mary of Argument
Arg	ument:
I.	The exception clause of the pension offset provision should be interpreted without incorporating by reference the gender-based dependence test held unconstitutional in Goldfarb.
	A. The exception clause should be fairly interpreted to avoid an unconstitutional result.
	B. The qualifying criteria of the exception clause should be interpreted to incorporate only constitutionally valid requirements for spousabenefits as "in effect in January, 1977."
	C. The qualifying criteria for spousal benefit as "being administered in January, 1977" did not require male applicants to prove dependency.
п.	If the exception clause of the pension offset provision incorporates by reference a gender-based dependency test, then the exception clause vio lates the equal protection component of the due process clause of the fifth amendment.

TABLE OF CONTENTS—Continued

	A. The protection of gender-based reliance in-
	terests is not an important governmental objective.
	B. The exception clause is not substantially related to the protection of reliance interests of retirees.
	C. The exception clause is a legislative attempt to reinstitute a provision previously held unconstitutional and is therefore unconstitutional itself.
I.	The inverse severability clause of the pension off- set provision unconstitutionally obstructs the exercise of judicial review.
	A. The inverse severability clause denies appelless' right to an adequate remedy for an unconstitutionally inflicted injury.
	B. By purporting to deny an injured litigant standing to sue, the inverse severability clause is an unconstitutional attempt to curtail the jurisdiction of the federal courts.
	C. Invalidation of the inverse severability clause does not intrude on the power of Congress to direct specific remedies for constitutional vi- olations.

TABLE OF AUTHORITIES

AS	Fages:
	Albemarle Paper Co. v. Moody, 422 U. S. 40510, 22
	Bell v. Hood, 327 U.S. 67845
	Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 38814,46
	Brown v. Board of Education:
	347 U. S. 453 44
	349 U S. 29413, 44
	Buckley v. Valeo, 424 U. S. 1 40
	Bush v. Lucas, — U. S. —, 103 S. Ct. 240446, 47, 54
	Califano v. Goldfarb, 430 U.S. 1991, 3, 4, 10, 11, 17, 20, 22, 26, 39, 41
	Califano v. Jablon, 430 U.S. 9244, 22, 41
	Califano v. Silbowitz, 430 U. S. 9244, 22, 41
	Califano v. Webster, 430 U.S. 31312, 27, 32
	Califano v. Westcott, 443 U.S. 76 41
	Califano v. Yamasaki, 422 U.S. 682 20
	Caloger v. Harris, 1981 Unempl. Ins. Rep. (CCH) ¶ 17,754 (D. Md. Mar. 25, 1981)
	Carlson v. Green, 446 U.S. 1446, 47, 49, 54
	Cary v. Curtis, 44 U.S. (3 How.) 23613,45
	Champlin Refining Co. v. Corporation Commis-

TABLE OF AUTHORITIES—Continued

Pag	ges
Coffin v. Secretary of Health, Education & Welfare, 400 F. Supp. 953	4
Craig v. Boren, 429 U.S. 190	27
Crowell v. Benson, 285 U. S. 2220,	, 45
Davis v. Passman, 442 U.S. 228	46
Dorchy v. Kansas, 264 U.S. 286	40
Duffy v. Harris, 1979 Unempl. Ins. Rep. (CCH) ¶ 16,906 (D.N.M. Oct. 23, 1979)	8
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59	50
Electric Bond & Share Co. v. SEC, 303 U. S. 419	40
Ex Parte McCardle, 74 U.S. (7 Wall.) 506	51
Frontiero v. Richardson, 411 U.S. 677	17
Gebbie v. United States R.R. Retirement Board, 631 F. 2d 512	23
Georgia v. United States, 411 U.S. 526	22
Hudgins v. Secretary of Health, Education & Welfare, 1980 Unempl. Ins. Rep. (CCH) ¶17,059 (D. Md. April 17, 1980)	8
INS v. Chadha, — U. S. —, 103 S. Ct. 2764	41
Iowa-Des Moines National Bank v. Bennett, 284 U. S. 23914,	49

TABLE OF AUTHORITIES—Continued

Page
Johnson v. Robison, 415 U.S. 361 5
Kirchberg v. Feenstra, 450 U.S. 45512, 2
Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 6825
Lauf v. E. G. Shinner & Co., 303 U. S. 323 5
Lemon v. Kurtzman, 411 U.S. 192 3
Lewis v. United States, 445 U.S. 5511, 15, 2
Lockerty v. Phillips, 319 U.S. 18214,4
Los Angeles Department of Water & Power v. Manhart, 435 U. S. 702
Manhart v. Los Angeles Department of Water & Power, 553 F. 2d 5812
Marbury v. Madison, 5 U.S. (1 Cranch) 13713,44,4
McElroy v. United States, 361 U.S. 281 4
Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 2
Michael M. v. Sonoma County Superior Court, 450 U.S. 464
Miller v. Department of Health & Human Services, 517 F. Supp. 1192
Mississippi University for Women v. Hogan,

TABLE OF AUTHORITIES—Continued
Pages
Nixon v. Fitzgerald, — U. S. —, 102 S. Ct. 2690 47
NLRB v. Gullett Gin Co., 340 U.S. 361 22
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., — U. S. —, 102 S. Ct. 2858
Norton v. Shelby County, 118 U.S. 42510, 22
Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 23349
Orr v. Orr, 440 U. S. 26842, 49, 50, 54
Procunier v. Navarette, 434 U.S. 555 39
Richardson v. Griffin, 409 U. S. 1069 41
Rosofsky v. Schweiker, 523 F. Supp. 1180, prob. juris. noted, 456 U. S. 959, appeal dis- missed, 457 U. S. 11417, 8, 25, 43
Rostker v. Goldberg, 453 U. S. 57 27
Sheldon v. Sill, 49 U.S. (8 How.) 440 52
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 2615,50
Stanton v. Stanton, 421 U.S. 7 42
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 144
Tarble's Case, 80 U.S. (13 Wall.) 397 52
United States v. Batchelder, 442 U.S. 114 20
United States v. Jackson, 390 U.S. 570 40
United States v. Klein, 80 U. S. (13 Wall.)

TABLE OF AUTHORITIES—Continued Pages
United States v. Lovett, 328 U.S. 30350, 52
United States v. Richardson, 418 U.S. 166 53
United States v. Testan, 424 U.S. 392 50
United States Dept. of Agriculture v. Moreno, 413 U.S. 52841
United States Railroad Retirement Board v. Fritz, 449 U.S. 16633,39
Valley Forge College v. Americans United for Separation of Church & State, 454 U.S. 46453
Wachtell v. Schweiker, No. 80-8022 (S. D. Fla. Jan. 26, 1982), appeal pending, No. 82-5552 (11th Cir. filed Apr. 30, 1982)8, 23, 37
Warth v. Seldin, 422 U.S. 490 50
Watson v. Buck, 313 U.S. 387 40
Webb v. Harris, 509 F. Supp. 10918, 23
Webb v. Schweiker, 701 F. 2d 81, petition for cert. pending, No. 82-2094 (filed June 21, 1983) 8
Weinberger v. Salfi, 422 U.S. 749 50
Weinberger v. Weisenfeld, 420 U.S. 636 41
Welsh v. United States, 398 U.S. 333_14, 40, 41, 43, 48
Wengler v. Druggists Mutual Insurance Co., 446 U.S. 14242
Yakus v. United States, 321 U.S. 414 45

TABLE OF AUTHORITIES—Continued Pag	00
MISCELLANEOUS:	Ca
Ballentine's Law Dictionary (3d ed. 1969)	30
W. Blackstone, Commentaries	45
J. Bondar, Initial Effects of Elimination of the Dependency Requirement on Entitlement to Husband's and Widower's Benefits, Research & Statistics Note No. 2 (SSA Office of Re- search Statistics, June 28, 1982)	34
123 Cong. Rec. (1977):	
р. 35406	18
p. 37200	18
p. 39024	19
р. 39047	19
p. 39132	19
Congressional Research Service, The Govern- ment Pension Offset in Social Security (Oct. 1st, 1982)	7
Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L. J. 498 (1974) 45,	51
Hart, The Power of Congress to Limit the Jur- isdiction of the Federal Courts: an Exercise Dialectic, 66 Harv. L. Rev. 1362 (1953)46,	51
H.R. Conf. Rep. No. 95-837, (95th Cong., 1st Sess. (1977)18, 19,	35
H.R. Conf. Rep. No. 97-985, 97th Cong., 2d Sess.	9

TABLE OF AUTHORITIES—Continued
La France, Problems of Relief in Equal Pro- tection Cases, 13 Clearing House Rev. 438 (1979)
President Carter's Social Security Proposals Hearings Before the Subcomm. on Social Security of the House Ways and Means Comm. 95th Cong., 1st Sess., Pt. 1 (1977)
S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. (1977)
Social Security Administration Claims Manua GN 02608.505 A (June, 1982)
Social Security Administration Claims Manua GN 02608.510 (June, 1982)
Social Security Claims Manual Transmittal No. 3844 (July 14, 1976)
Social Security Financing Proposals: Hearing Before the Subcomm. on Social Security of the Senate Finance Comm., 95th Cong., 1s Sess. (1977)
Staff of the House Comm. on Ways and Means 95th Cong., 1st Sess., WMCP: 95-61, Sum mary of the Conference Agreement on H.R. 9346 (Comm. Print 1977)
Staff of the Senate Comm. on Finance, 95th Cong., 1st Sess., Summary of H.R. 9346, th

TABLE OF AUTHORITIES—Continued	Pages
Social Security Amendments of 1977 (Passed by the Congress (P.L. 95-216) (Comp. Print 1977)	n.
Constitution and Statutes:	
U.S. Const. Amend. V (Due Process Clause).	1, 25
Social Security Act, 42 U.S.C. (& Supp. V) 301 et seq.:	
Section 202(b) (1) (B), 42 U.S.C. § 402(b)	
Section 202(c), 42 U.S.C. § 402(c)	
Section 202(c) (1), 42 U.S.C. § 402(c) (1)	21
Section 202(c) (1) (B), 42 U.S.C. § 402(c)	31
Section 202(c) (1) (C), 42 U.S.C. § 402(c)) 3
Section 202(f), 42 U.S.C. § 402(f)	3, 16
Section 202(f), 42 U.S.C. § 402(f) (1) (D)	3
Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509:	
Section 334	1,5
Section 334(b) (1), 91 Stat. 1544	21
Section 334(f), 91 Stat. 1546	3, 31, 37
Section 334(g) (1)	5

TABLE OF AUTHORITIES—Continued Pag	es
Section .34(g) (1) (A), 91 Stat. 1546	5
Section 334(g) (1) (B), 91 Stat. 1547	16
Section 334(g) (3), 91 Stat. 1546	40
Section 337(b), 91 Stat. 1548	24
Pub. L. No. 97-455, Section 7, 96 Stat. 2501	8
Pub. L. No. 97-455, Section 7(a), 96 Stat. 2501	17
Social Security Amendments of 1983, Pub. L. No.	
98-21, Section 337, 97 Stat. 1319,	35

CONSTITUTIONAL PROVISION INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

LEGISLATIVE PROVISIONS INVOLVED

Section 334 of Public Law 95-216 provides for the nonapplicability of the 1977 Amendments as follows:

The amendments . . . shall not apply with respect to any monthly insurance benefit payable, under subsections (b), (c), (e), (f) or (g) (as the case may be) of section 202 of the Social Security Act, to an individual . . . who at the time of application for or initial entitlement to such monthly insurance benefit under such subsections (b), (c), (e), (f), or (g) meets the requirements of that subsection as it was in effect and being administered in January, 1977.

The severability clause of Section 334 of Public Law 95-216 provides in pertinent part:

If any provision of this subsection, or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid.

STATEMENT

1. This appeal involves two aspects of the exception clause of the pension offset provision which was enacted as part of the Social Security Amendments of 1977. The first aspect involves an attempt by Congress to resurrect the gender-based dependency test held unconstitutional in Califano v. Goldfarb, 430 U.S. 199 (1977) and make it applicable to applications for spousal benefits in the five-

year period between December, 1977, and December, 1982. The second aspect involves a congressional attempt to shield the resurrected dependency test from legal challenge and judicial review through the use of an inverse severability clause.

2. Appellee Robert Mathews is a 67 year old white male who retired in November, 1977, from his job with the Post Office. He has never been an insured individual under the Social Security Act and has never received oldage, survivor, or disability benefits under the Act. His wife, Mary, worked as an employee of a local bank in Cullman, Alabama, for 35 years. She was a fully insured individual under the Social Security Act at the time of her retirement in June, 1977.

Prior to his retirement, Mr. Mathews inquired of his local Social Security office as to whether or not he would be eligible for spousal benefits. Tr. 42 ("Tr." refers to the transcript of the administrative proceedings in this case). He was advised that, as a result of the Court's decision in Goldfarb, he would indeed be entitled to receive benefits under subsection 202(c) of the Social Security Act (42 U. S. C. § 402(c) (1976)), notwithstanding his receipt of a government pension. Based at least in part upon this appraisal of his eligibility for spousal benefits, Mr. Mathews made his retirement decision and did subsequently retire in November, 1977. Tr. 42.

In December of 1977, Mr. Mathews filed an application for husband's insurance benefits based on his wife's earnings records.¹ Although Mr. Mathews filed his appli-

¹Mr. Mathews filed his application for spousal benefits 30 days before his 52nd birthday—January 13, 1978. 42 U.S.C. § 402(c), both before and after the Goldfarb decision, required that the husband be at least age 62 before being eligible for spousal benefits.

cation for spousal benefits at a time during which he did not have a demonstrate dependency, the Social Security Administration advised him on March 23, 1978, that, as a result of the Social Security Amendments of 1977, the fact that Mr. Mathews was not dependent upon his wife would cause his monthly spousal benefit to be offset, dollar for dollar, by the amount of his government pension. Social Security Amendments of 1977 Pub. L. No. 95-216, § 334(f), 91 Stat. 1546 (1977). Had the gender of the Mathewses been reversed, Mrs. Mathews' application as a non-dependent spouse would have been granted, and her spousal benefits would not have been subjected to offset by the amount of her government pension.

3. On March 2, 1977, the Court, in Califano v. Gold-farb, 430 U.S. 199 (1977), held that the gender-based dependency test found in subsection 202(f) of the Social Security Act (former 42 U.S.C. § 402(f)) was violative of the equal protection component of the fifth amendment. Prior to the Goldfarb decision, benefits to spouses of deceased, retired, or disabled workers who were covered under the provisions of the Social Security Act were paid according to a gender based dependency test. Former 42 U.S.C. § 402(c) (1) (C), (f) (1) (D). Wives automatically received spousal benefits, although their benefits were subject to the dual entitlement rule, which offset the amount of spousal benefits by the amount of any primary benefits earned by the wives in covered employment. Husbands, on the other hand, in order to receive spousal benefits

³On the date of his application for spousal benefits, Mr. Mathews was receiving a civil service pension of \$573.00 per month (\$6,876.00 annually) for thirty-two years of service. The Social Security Administration determined that he would be entitled to receive \$153.20 in spousal benefits. Since the amount of his government pension exceeded the amount of his entitlement to spousal benefits, the latter was reduced to zero.

fits, had to satisfy a gender-based dependency test. This dependency test required proof that the male applicant received at least one-half of his support from his wife. If this dependency test were met, his benefits were also subject to the rule on dual entitlement. Thus, the rules governing eligibility for spousal benefits resulted in the work of females (who were covered by the Social Security Act and whose husbands received a government pension) providing less protection for their families in the form of benefits than the work of males (who were covered by the Social Security Act and whose wives received a governmental pension).

Goldfarb eliminated this inequity by invalidating the dependency requirement as a condition of eligibility for widowers' benefits. Shortly thereafter the Court summarily affirmed two district court decisions which had voided the same type of dependency test for husbands' insurance benefits under subsection 202(c) of the Social Security Act (former 42 U.S.C. § 402(c)). Califano v. Silbowitz, 430 U.S. 924 (1977); Califano v. Jablon, 430 U.S. 924 (1977). Although the effect of these decisions was to judicially eliminate the dependency requirement as a condition of eligibility for spousal benefits, the same dependency requirement surfaced as a qualifying criterion after the Social Security Amendments of 1977.

The Social Security Amendments of 1977 were the result of congressional consideration of the problems of decoupling (correcting the over-indexing problem created in 1972), increases in the payroll tax rate, and other fundamental issues having to do with the financing and benefit

³The Court also dismissed the Secretary's appeal in another case involving both subsections (c) and (f). Coffin v. Secretary of Health, Education & Welfare, 400 F. Supp. 953 (D.D.C. 1975), appeal dismissed, 430 U. S. 924 (1977).

structure of the social security system. Within these amendments are found the pension offset provision and its exception clause. Social Security Amendments of 1977. Pub. L. No. 95-216, § 334, 91 Stat. 1546 (1977). Under the pension offset provision, any claim for spousal benefits by an applicant whose work history is based on employment not covered by the Social Security Act is offset dollar for dollar by the amount of any public pension received by the applicant. The exception clause to this provision provides, in essence, that the offset does not apply to persons who retire or could retire within five years of the effective date of the offset and who would have been eligible for full spousal benefits under the Social Security Act "as it was in effect and being administered in January. 1977" Social Security Amendments of 1977, Pub. L. No. 95-216, § 334(g) (1), 91 Stat. 1547 (1977).

In implementing Public Law 95-216, the Social Security Administration has interpreted the exception clause to mean that the offset will not apply to a particular applicant if:

- The applicant for spousal benefits is either receiving or eligible to receive a government pension for any month in the period December, 1977 through November, 1982; and,
- 2. The applicant for spousal benefits would, at the time of filing for spousal benefits, meet all the requirements for entitlement as they were in effect and being administered in January, 1977, including the gender-based dependency test.⁵

⁴The exception clause remained in effect until November, 1982 — sixty months after it was enacted. Social Security Amendments of 1977, Pub. L. No. 95-216, § 334(g)(1)(A), 91 Stat. 1546 (1977).

³Social Security Administration Claims Manual GN 02608: 505A (June, 1982). The following example is given by the So-(Continued on next page)

The effect of this interpretation is to, once again, require male applicants for spousal benefits to prove dependency according to the pre-Goldfarb mandates of 42 U.S.C. § 402

(Continued from previous page)

cial Security Administration in explaining the application of the

exception clause to the pension offset provision:

Example: Mary Smith was married to Sam for 22 years. They were divorced in 1970 and she married Harold. All three have worked in noncovered government employment and are or will be eligible for pensions based on that work. Mary had also worked for over 10 years in private employment covered by social security. Neither Sam nor Harold has ever worked in covered employment but both plan on filing for spouse's benefits based on Mary's earnings record, when they reach age 62.

Mary will first be eligible for her government pension in June, 1978, but does not plan on retiring until June, 1983, when she will attain age 65 and qualify for full (not actuarially reduced) retirement insurance benefits. Her ex-husband, Sam, will retire and be eligible for his government pension in January 1983. He will reach age 62 in January 1983. Mary's present husband, Harold, has retired and has been receiving a government pension since December 1979. He will reach age 62 in January 1983.

Effect of offset provision on each:

Mary: When Mary applies for social security benefits, she will not be affected by the offset in any way, since her benefits will be based on her own earnings record and not that of a spouse or former spouse.

Harold: When Harold applies for social security benefits, he will have to apply for husband's benefits based on Mary's earnings, since he has no earnings record of his own. He receives a pension based on his own government work and that work was not covered by social security. And, he files for social security after December 1977. Therefore, he is subject to the offset, unless he meets the two conditions for the exception. He obviously meets the first condition, since he is receiving his pension between 1977 and 1982, but he cannot qualify for social security benefits under the January 1977 rules which included a one-half support dependency test for husband's benefits. Therefore, the governmental pension offset is applied, reducing his social security bene-

(Continued on next page)

(c)—this time in order to avoid the harsh effects of the pension offset provision. Similarly situated female applicants, on the other hand, automatically qualify for the exception clause without proof of dependency. This results in female wage earners being afforded less protection for their spouses than is provided to a similarly situated male wage earner.

Apparently recognizing the problems created by this attempt to reinstate the gender-based dependency test,6

(Continued from previous page) fits one dollar for every dollar he receives in his month-

ly pension check.

When Sam applies for social security benefits, he must apply for divorced husband's benefits based on Mary's earnings record, since he has no social security earnings record of his own. Sam will be receiving or eligible to receive a pension based on his own government work and that work will not have been covered by social security on the last day he is employed. And, he files for social security after December, 1977. Therefore, he is subject to the offset, unless he meets the two conditions for the exception.

Sam does not meet either of the conditions for the exception. He was not eligible to receive a government pension until after the period December 1977 through November 1982, and, he cannot qualify for social security benefits under the January 1977 rules. No divorced husbands received benefits until the court decision created them later in 1977. Therefore, Sam's social security benefits are subject to the governmental pension offset. Note, however, that Sam does not become eligible for social security dependent's benefits immediately upon his 62nd birthday; he must wait until Mary files for benefits as a retired worker six months later in June 1983.

⁶There were at least seven other lower court decisions involving male applicant challenges to the exception clause which were brought to the attention of Congress during its consideration of modifications to the exception clause. Congressional Research Service, The Government Pension Offset in Social Security 29 (October 1, 1982). See Rosofsky v. Schweiker, 523 F. Supp. 1180 (E.D. N.Y. 1981); Miller v. Department of Health &

(Continued on next page)

and facing the November, 1982, expiration of the exception clause, Congress agreed on December 21, 1982, to extend the exception clause and to amend its eligibility requirements. The new provision extends the exception clause until July, 1983, but requires both male and female applicants to demonstrate dependency before being eligible for inclusion within the exception clause. Pub. L. No. 97-455, § 7, 96 Stat. 2501 (1982).

(Continued from previous page)

'Iuman Services, 517 F. Supp. 1192 (E.D. N.Y. 1981); Webb v. Harris, 509 F. Supp. 1091 (N.D. Cal. 1981); Caloger v. Harris, 1981 Unempl. Ins. Rep. (CCH) ¶17,754 (D. Md. Mar. 25, 1981); Wachtell v. Schweiker, No. 80-8022, (S.D. Fla. Jan. 26, 1982) (See Mot. to Aff. App. C); Hudgins v. Sec. of H.E.W., 1980 (Unempl. Ins. Rep. (CCH) ¶17,059 (D. Md. April 17, 1980); Duffy v. Harris, 1979 Unempl. Ins. Rep. (CCH) ¶16,906 (D.N.M. Oct. 23, 1979). Rosofsky held that the gender-based exception clause was unconstitutional but that the inverse severability provision required the male applicant to go remediless. The Secretary appealed this holding. Probable jurisdiction was noted, 456 U. S. 959 (1982), and the Secretary subsequently dismissed the appeal. 457 U. S. 1141 (1982). The courts in Duffy and Miller upheld the exception clause based upon application of the traditional rational basis standard of review. In Hudgins, a pro se proceeding, no constitutional issues were raised.

Both the Webb and Wachtell decisions held that the exception clause should be interpreted without incorporating the gender-based dependency test in former 42 U.S.C. § 402(c) and (f). An appeal was taken by the Government in Webb, and on March 7, 1983, the Ninth Circuit affirmed the district court's analysis. Webb v. Schweiker, 701 F. 2d 81 (9th Cir. 1983), petition for cert. filed, sub nom. Heckler v. Webb, 51 U. S. L. W. 3922 (U. S. June 21, 1983) (No. 82-2094). The Government has also appealed the decision in Wachteli. Wachtell v. Schweiker, No. 80-8022 (S.D. Fla. Jan. 26, 1982), appeal docketed, No. 82-5552 (11th Cir. Apr. 30, 1982).

⁷The amendments to the Social Security Act appear in Section 7 of the Virgin Island Tax Bill. The Conference Report offers the following explanation for elimination of the gender-based dependency test:

The Conferees agreed that in lieu of a modification of the public pension offset clause, the public pension offset (Continued on next page)

Since the 1982 changes to the exception clause provided only a temporary solution to the pension offset problem, Congress again addressed the problem in 1983. Congress has solved the dilemma posed by the 1977 and 1982 versions of the exception clause to the pension offset provision through the Social Security Amendments of 1983, which became effective on April 20, 1983. Under the 1983 statute, applicants for spousal benefits who become eligible for a public pension after June, 1983, will have their spousal benefits offset by only two-thirds the amount of their public pensions, but no longer is there an exception clause available to these applicants. Social Security Amendments of 1983, Pub. L. No. 98-21, 6 337, 97 Stat. 131 (1983). Further, this statute contains no gender-based distinctions governing the application of the pension offset, nor any reference to earlier statutes within its eligibility criteria.

SUMMARY OF ARGUMENT

I

The exception clause should be interpreted so as to incorporate no gender-based dependency test. The statutory language which is at issue in the present case is the phrase "as . . . in effect and being administered in January, 1977." The Secretary would have the Court construe this language so as to require male applicants for spousal benefits to demonstrate dependency before they would be

(Continued from previous page)

would not apply to an individual who becomes eligible for a public pension prior to July, 1983 if that individual is dependent upon his or her spouse for one-half support. The one-half support test would be applied according to the pre-1977 law, except that it would apply to both men and women.

H.R. Conf. Rep. No. 97-985, 97th Cong., 2d Sess. 13 (1982).

eligible for inclusion within the exceptions clause and thus be exempt from the pension offset provision. This construction obliges the Court to validate a congressional attempt to reinstitute a gender-based dependency test previously held unconstitutional by the Court in Califano v. Goldfarb, 430 U.S. 199 (1977). In contrast to the Secretary's construction, appellees offer a construction which requires the Court to reach no constitutional issues.

Examination of the qualifying criteria for spousal benefits as they were "in effect . . . in January, 1977" shows that they contained no requirement for a genderbased proof of dependency. This is so because the Goldfarb court invalidated the gender-based dependency test as violative of the equal protection guarantee. Since the gender-based dependency test was unconstitutional, it is "as inoperative as though it had never been passed." Norton v. Shelby County, 118 U.S. 425, 442 (1886). It is therefore evident that subsections (c) and (f), which are at issue in the present case, as "in effect . . . in January, 1977" contained no gender-based dependency test. Furthermore, Congress, when it enacted the exception clause, was aware of this Court's decision nine months earlier in Goldfarb. Because the exception clause re-enacts subsections (c) and (f) within the qualifying criteria of the exception clause, Congress is presumed to be aware of the judicial interpretation given those subsections and is presumed to have adopted their judicial interpretation. Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n. 8 (1975). Therefore, when Congress re-enacted subsections (c) and (f) it intended to re-enact only those constitutionally valid requirements of subsections (c) and (f) and did not intend to re-enact the unconstitutional gender-based dependency test.

Examination of the qualifying criteria of subsections (c) and (f) as they were "being administered in January, 1977" also shows that they contained no requirement for a gender-based proof of dependency. In January, 1977, the Social Security Administration was administering the exception clause by delaying any decision as to whether or not to grant benefits under subsections (c) and (f) until this Court's decision in Goldfarb. Thus, subsections (c) and (f) "as being administered in January, 1977" deferred to this Court's decision in Goldfarb. After Goldfarb it became clear that subsections (c) and (f) contain no gender-based dependency test.

Because appellees' interpretation of the exception clause is "a fair alternative construction" which avoids any question of constitutional validity, it is the interpretation which must be followed. Lewis v. United States, 445 U.S. 55, 65 (1980).

П.

If this Court decides that the qualifying criteria of the exception clause contains a gender-based dependency test, then this exception clause is unconstitutional because it violates the equal protection conponent of the fifth amendment. The exception clause treats men and women differently. It requires proof of dependency by nondependent male government employees and requires no proof of dependency by nondependent female government employees. Thus, similarly situated individuals are treated differently, solely on the basis of sex.

Since the exception clause treats similarly situated persons differently, solely on the basis of sex, the government carries the burden of showing an "'exceedingly persuasive justification' for the classification," which can be met by showing an important governmental objective furthered by substantially related means. Mississippi University for Women v. Hogan, — U.S. —, 102 S.Ct. 3331, 3336 (1982) (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)). In this case the government has failed to meet this burden.

The exception clause protects only gender-based reliance interests. It protects the reliance interests of all women, while protecting the reliance interests of dependent men only. Since there is no reason to compensate women for past discrimination in the area of reliance interests, then a governmental objective which seeks to protect the reliance interests of women to a greater extent than the reliance interests of men is not an important governmental objective. Califano v. Webster, 430 U.S. 314 (1977). Thus, if the governmental objective embodied in the exception clause is the protection of gender-based reliance interests, then the exception clause is unconstitutional because such an objective is not an important governmental objective.

If, however, the important governmental objective embodied in the exception clause is the protection of all reliance interests, rather than gender-based reliance interests, then the exception clause is unconstitutional because the means it employs are not substantially related to that end. Because the reliance interests of women are protected to a greater degree than the reliance interests of men, the exception clause does not employ means which are substantially related to the protection of the "reliance interest of [all] retirees." (Appellant's Brief at 31, argument heading B).

Furthermore, if the exception clause re-incorporates a gender-based dependency test, then the exception clause must be viewed as a congressional attempt to re-enact a provision previously held unconstitutional by the Court. If the Court recognizes the validity of such a congressional attempt to ressurect the unconstitutional, then the door will be opened to allow the legislature to legislate away the effects of any constitutional adjudication with which it is dissatisfied. Although the protection of reliance interests is a valid legislative objective, such an objective cannot validate a statute, such as the exception clause, which delays not only the effects of a statute, but also the effects of a constitutional adjudication.

Ш.

The inverse severability clause at issue in the present case is unconstitutional because it attempts to preclude the courts from granting any tangible relief to the only persons harmed by the underinclusiveness of the exception clause. Although the Court has generally sought to ascertain the remedial design of the legislature and has given effect to severability clauses which provide for some form of relief to the parties injured by a violation of constitutional rights, the Court has never upheld a severability clause like the one at issue here (an inverse severability clause) which denies any tangible relief whatever to those injured by a statute's unconstitutionality.

It is well settled that a remedy for the injury inflicted by the violation of a constitutional right is an essential part of the right itself. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Brown v. Board of Education, 349 U.S. 294 (1955). It is also firmly established that the remedial power of the federal courts is independent from obstruction by Congress and that the Court will only sustain restrictions upon this power when Congress has provided alternative, constitutionally adequate remedies for violations of constitutional rights. Cary v. Curtis, 44 U.S.

(3 How.) 236 (1845), Lockerty v. Phillips, 319 U.S. 182 (1943).

This Court has the inherent power and responsibility to provide a remedy to appellees herein. Binens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Although the Secretary argues that appellees can receive a constitutionally adequate remedy by "obtaining a judicial decree that the exception provision violates" the equal protection guarantee (Appellant's Brief at 48), it is clear that such a remedy is not constitutionally adequate. The Court has repeatedly drawn the distinction between correction of an unconstitutional classification and the grant of a remedy for the injury caused by such a classification. Welsh v. United States, 398 U.S. 333, 363 (Harlan, J., concurring); Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 247 (1931).

The injury inflicted by the underinclusiveness of the exception clause is not the abstract wrong of unequal treatment but the concrete denial of spousal benefits. This is the effect envisioned by the inverse severability clause. Therefore, because the inverse severability clause attempts to deprive the Court of its power to grant a constitutionally adequate remedy to appellees by extension of benefits to their class, it is unconstitutional and cannot be enforced.

The inverse severability clause at issue herein is also unconstitutional because it attempts to deny appellees of their standing to contest the constitutionality of the exception clause. By purporting to nullify the grace period granted by the exception clause in the event it is found unconstitutional, the inverse severability clause would have the effect of insuring that appellees could not "stand to profit in some personal interest" should their challenge

prove successful, thus making the "exercise of judicial power . . . gratuitous." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 39 (1976). Thus, the inverse severability clause herein is a congressional attempt to destroy appellees' standing by removing from their claim any attributes of a "case or controversy." While the "exceptions" clause of article III grants Congress substantial power to define the subject matter jurisdiction of this Court, Congress cannot constitutionally deprive the Court of all jurisdiction to hear constitutional claims by persons tangibly harmed by a violation of constitutional rights.

Therefore, the inverse severability clause is unconstitutional because it is an improper congressional exercise of the "exceptions" clause. It attempts to remove appellees' claim from the jurisdiction of this Court by reducing it to a nonjusticiable issue.

ARGUMENT

I. The exception clause of the pension offset provision should be interpreted without incorporating by reference the gender-based dependency test held unconstitutional in Goldfarb.

The statutory language at issue in this case is that of the exception clause to the pension offset provision. As in any case involving the interpretation of a statute, the starting point must be the language of the statute itself. Lewis v. United States, 445 U.S. 55, 60 (1980). In this instance the relevant language of the exception clause is as follows:

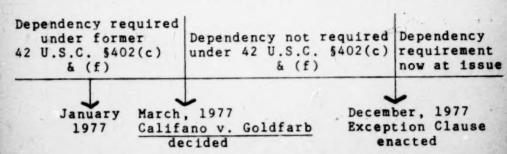
The [pension offset] . . . shall not apply to an individual . . . who at the time of application for or initial entitlement to such monthly insurance benefit under

such subsection (b), (c), (e), (f), or (g) meets the requirements of that subsection as it was in effect and being administered in January, 1977. (Emphasis added.)⁸

The specific point of contention between the Secretary and appellees is the meaning to be given the phrase "in effect and being administered in January, 1977." Resolution of this issue will determine whether or not appellees fit within the provisions of the exception clause and are therefore eligible for spousal benefits without offset.

Simply stated, the Secretary's interpretation of this language would require proof of dependency by male applicants as a precondition to their receipt of spousal benefits. This is so because the Secretary reads the exception clause so as to require male applicants to fulfill all criteria set out in subsections 202(c) and (f) as these sections existed prior to Goldfarb. Of course, this interpretation chooses to ignore the fact that when the exception clause makes reference to these subsections it does so only after and in light of Goldfarb.

The interrelationship between subsections 202(c) and (f), the *Goldfarb* decision, and the exception clause can easily be seen in the following representation:



⁸The Social Security Amendments of 1977, Pub. L. 95-216, § 334(g) (1) (B), 91 Stat. 1547 (1977).

As the time line demonstrates, the exception clause was enacted after the Goldfarb decision had voided the dependency requirement for male applicants for spousal benefits. Given this history, it cannot be assumed that Congress, in referring to subsections (c) and (f), intended to resurrect the pre-Goldfarb dependency test. If Congress had intended to require male applicants to prove dependency in order to qualify for the exception clause. it could simply and unambiguously have done so by adding a dependency requirement to the exception clause9 rather than choosing the "complex and circuitous formulation" that it did. (Appellant's Brief at 25) Of course. any criteria for eligibility which contained a gender-based dependency test would be immediately suspect in light of the Court's prior cases. Califano v. Goldfarb, 430 U. S. 199 (1977): Frontiero v. Richardson, 411 U.S. 677 (1973).

Moreover, the meaning of the January, 1977, date which is included in the exception clause is not readily apparent from the legislative history surrounding its enactment.¹⁰ Examination of this legislative history reveals the fact that very little consideration was given by Congress to the exception clause.¹¹ Furthermore, this legis-

⁹Congress unambiguously legislated such a dependency test, applicable to both male and female applicants, as part of the 1982 exception clause revisions. Pub. L. 97-455, § 7(a), 96 Stat. 2501 (1982).

¹⁰Nowhere in the legislative history of the exception clause is there any explanation as to why this particular date was chosen over any other nor any explanation of the meaning of this date.

¹¹The Carter Administration, after considering the effects of the Goldfarb decision, recommended several proposals aimed at eliminating the various gender-based distinctions remaining in the Social Security Act and addressing what was perceived as the problem of "windfall" benefits resulting from (Continued on next page)

lative history reveals no intent by Congress to limit the operation of the exception clause by factoring out those

(Continued from previous page)

the Goldfarb decision. One of these proposals would have established a new dependency test to be applied equally to male and female applicants for spousal benefits. Social Security Financing Proposals: Hearings Before the Subcomm. on Social Security of the Senate Finance Comm., 95th Cong. 1st Sess. 117 (1977) (statement of Robert M. Ball); President Carter's Social Security Proposals: Hearings Before the Subcomm. on Social Security of the House Ways and Means Comm., 95th Cong., 1st Sess., Pt. 1 at 158 (1977) (statement of Robert M. This proposal was examined in Congress at the same time that decoupling (correcting the over-indexing problem created in 1972), increases in the payroll tax rate, and other fundamental issues having to do with the financing and benefit structure of social security were being considered. On October 27, 1977, the House of Representatives, after considering the Carter Administration proposals, passed a social security financing bill that contained no specific provision addressing the perceived problem of "windfall" benefits. 123 Cong. Rec. 35406-07 (1977).

In contrast to the House-passed proposal, the Senate Finance Committee recommended, as part of a social security financing measure, the adoption of a pension offset provision. Under this proposal any claim for spousal benefits by an applicant whose work history was based on employment not covered by the Social Security Act would be offset dollar for dollar by the amount of any public pension received by the applicant. This provision was included in the social security financing bill accepted by the Senate on November 4, 1977. 123 Cong. Rec. 37200 (1977).

Because of the discrepancies between the Senate reform proposal and the bill passed by the House, the matter was referred to a Conference Committee with only 3 days remaining in the legislative session. The House conferees accepted the Senate concept of a pension offset provision but receded with an amendment adding an exception clause which postponed until December 1982 the full effectiveness of the pension offset provision. H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 42 (1977). Only those who were eligible for full spousal benefits under the Social Security Act "as it was in effect and being administered in January, 1977" were eligible for inclusion within this exception clause.

The conference agreement, in the form of the Social Security Amendments of 1977, was presented to both the Senate (Continued on next page)

men who had retired, or soon would retire, and who had made their retirement decisions in reliance upon their eligibility for spousal benefits.¹² The Secretary's inter-

(Continued from previous page)

and the House on December 15, 1977. 123 Cong. Rec. 39132 (1977). Due to the urgent need for social security financing reform, the exception clause to the pension offset provision, along with the other security financing measures, were discussed and approved on December 15, 1977—the last day of the legislative session. The "Social Security Amendments of 1977" were signed into law by President Carter on December 20, 1977.

In order to pass the proposal on December 15, 1983, it was necessary for Congress to waive the three day waiting period before considering a conference report. 123 Cong. Rec. 39024 (1977) (remarks of Rep. Harris). As one Congressman cautioned:

"[w]hile the amendment [exception clause to the pension offset] may eventually prove to be equitable and only deprive persons from receiving social security who can afford the loss, I believe this matter should have been subject to thorough study before becoming law, and I regret it did not follow the normal committee and floor consideration . . . Mr. Speaker, I fear this provision will bring us grief."

123 Cong. Rec. 39047 (1977) (remarks Rep. Whalen).

¹²The legislative history of the exception clause evidences a primary congressional concern for men like Mr. Mathews, who might have retired relying upon their eligibility to receive full spousal benefits. See H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 72 (1977). S. Conf. Rep. No. 95-612, 1st Sess. 72 (1977). ("Inclusion of this exception to the . . . [offset] provision, reinforces its prospective nature and avoids penalizing people who are already retired, or close to retirement, from public employment and who cannot be expected to readjust their retirement plans to take account of the 'offset' provision that will apply in the future.") (emphasis added); Staff of Senate Comm. on Finance, 95th Cong. 1st Sess., Summary of H.R. 9346, the Social Security Amendments of 1977 as Passed by the Congress (P.L. 95-216) 7 (Comm. Print 1977) ("To assure that persons who have been counting on these benefits for many years and who are now at or nearing retirement age will not be adversely affected, H.R. 9346 includes a transitional exception under which certain individuals will not have their social

(Continued on next page)

pretation offers no protection for the reliance interests of these men—reliance interests which should be protected to the same extent as those of women.

A. The exception clause should be fairly interpreted to avoid an unconstitutional result.

The Court, in considering which construction to place on the exception clause, must choose that interpretation which avoids any question of constitutional validity if there is "a fair alternative construction." Lewis v. United States, 445 U.S. 55, 65 (1980). See also Califano v. Yamasaki, 442 U.S. 682 (1979); United States v. Batchelder, 442 U.S. 114, 122 (1979); Crowell v. Benson, 285 U.S. 22, 62 (1932). The Court is confronted with two alternative constructions. If the Secretary's interpretation is accepted, the exception clause must be viewed as the congressional re-enactment of a dependency test which was held unconstitutional by this Court in Califano v. Goldfarb. By comparison, appellees offer a construction

(Continued from previous page)

security benefits as spouses reduced by the amount of their public pension.") (emphasis added); Staff of the House Comm. on Ways & Means, 95th Cong., 1st Sess., WMCP: 95-61 Summary of the Conference Agreement on H.R. 9346 at 5 (Comm. Print 1977) ("[the purpose of the exception clause] is to protect those persons who were expecting a social security dependency benefit based on their spouse's record." (emphasis added). It seems apparent that in referring to those women who might have relied upon entitlement to full spousal benefits, the conferees did not intend to limit the coverage of the exception clause to only those women, but, rather, to point to an example of these individuals who had a legitimate reliance interest which was deserving of protection.

¹³For example, the Secretary's interpretation would require that an applicant for husband's insurance benefits demonstrate that he:

⁽A) has filed application for husband's insurance benefits,

⁽B) has attained age 62, and

which contains no reference to an unconstitutional genderbased dependency test.¹⁴ The construction proffered by appellees both avoids a constitutional issue and is the better reading of the statute.¹⁵

B. The qualifying criteria of the exception clause should be interpreted to incorporate only constitutionally valid requirements for spousal benefits as which were "in effect . . . in January, 1977."

There is no disagreement between the Secretary and appellees that the exception clause incorporates by reference the eligibility criteria of subsections (c) and (f) of

(Continued from previous page)

(C) was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from [his wife]

(D) is not entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife.

Former 42 U.S.C. § 402(c)(1). The Secretary asks the Court to apply the above statutory language, notwithstanding the fact that the dependency test in subparagraph (c) is visibly absent from Social Security Amendments of 1977. Pub. L. 95-216, § 334(b)(1), 91 Stat. 1544 (1977).

¹⁴Appellees' interpretation would require an applicant to meet the following subsection (c) eligibility requirements:

- (A) has filed application for husband's insurance benefits,
- (B) has attained age 62, and
- (C) is not entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife.

42 U.S.C. § 402(c) (1) (Supp. V).

¹⁸It is obvious that the construction by the Secretary requires the Court to review the constitutionality of the gender-based dependency test, while appellees' construction does not mandate judicial review of any constitutional questions. Appellees' alternative is obviously "fairly possible" as it simply reads subsections 202(c) and (f) of the Social Security Act in light of the Goldfarb decision.

the Social Security Act. There is also no disagreement that subsections (c) and (f) were judicially reviewed by the Court prior to the enactment of the exception clause. Califano v. Goldfarb, 430 U.S. 199 (1977); Califano v. Silbowitz, 430 U.S. 924 (1977); Califano v. Jablon, 430 U.S. 924 (1977). It is readily apparent in Mr. Mathews' case that in order to qualify under the exception clause he must meet the requirements for subsection (c) entitlement. What is in dispute is whether Mr. Mathews and the class he represents must satisfy a dependency test as part of the requirements of subsections (c) or (f) as "in effect . . . in January, 1977."

The Court has repeatedly stated that, when Congress re-enacts a statute without change, Congress is presumed to be aware of the judicial interpretation given that statute and is further presumed to have adopted its judicial interpretation. Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n. 8 (1975). See also Merrill, Lynch, Pierce, Fenner, & Smith v. Curran, 456 U.S. 353, 378-79, 388 (1982); Georgia v. United States, 411 U.S. 526, 533 (1973); NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951). In applying this presumption to the present case, it can be seen that Congress, in enacting the exception clause, intended to incorporate subsections (c) and (f) as modified by Goldfarb. This means that the exception clause does not incorporate a gender-based dependency test, because no such dependency test existed in subsections (c) and (f) at the point in time in which the exception clause was enacted. Furthermore, because the gender-based dependency test was an unconstitutional provision, it is "as inoperative as though it had never been passed." Norton v. Shelby County, 118 U.S. 425, 442 (1886). Therefore, subsections

(c) and (f) "as in effect . . . in January, 1977" did not contain any requirements for proof of dependency.16

The Secretary's only rebuttal to this interpretation is to claim that, were appellees' interpretation accepted, "the exception clause would apply to essentially all applicants prior to December 1982" and that this "would largely vitiate the offset provision for the designated five-year period." (Appellant's Brief at 25) The Secretary implies that the January, 1977, date, without the construction given the exception clause by the Secretary, would, at the least, render the pension offset provision ineffective and. at the most, render the exception clause meaningless. This implication ignores the fact that the January, 1977, date has significance to classes of applicants other than spouses of deceased government workers. For example, the January, 1977, date affects the classes of young husbands, divorced husbands, and surviving divorced fathers. These classes of beneficiaries cannot meet January, 1977, eligibility requirements because there was no such beneficiary category in January, 1977. Social Security Claims Manual GN 02608.510 (June 1982). Further, all female appli-

¹⁶See Webb v. Harris, 509 F. Supp. 1091 (N.D. Cal. 1981), aff'd, 701 F.2d 81 (9th Cir. 1983); Wachtell v. Schweiker, No. 80-8022 (S.D. Fla. Jan. 26, 1982) (See Mot. to Aff. App. C.). The Seventh Circuit, in a decision subsequent to this Court's decision in Goldfarb, interpreted a statute which incorporated a reference to the "Social Security Act as in effect on December 31, 1974." Gebbie v. United States R.R. Retirement Board, 631 F.2d 512 (7th Cir. 1980). In this case, male applicants who became eligible for social security spousal benefits as a result of the Goldfarb decision sought benefits also under the Railroad Retirement Act of 1974. The Retirement Board held that, based upon the language of the statute, the male applicants had to prove dependency in order to be entitled to additional benefits. The Seventh Circuit held that the language of the statute must be interpreted in light of the Goldfarb decision and the dependency test was no longer applicable. The Solicitor General did not seek review of this decision.

cants for divorced wives' or surviving divorced wives' benefits whose marriages lasted longer than 10 years but less than 20 years would not be eligible for the exception clause. Thus, it can be seen that, despite the Secretary's claim, appellees' interpretation does give meaning to the January, 1977, date and does not render the pension offset provision ineffective for five years by way of universal extension of the exception clause.

C. The qualifying criteria for spousal benefits as "being administered in January, 1977" did not require male applicants to prove dependency.

Perhaps the most obvious key to the correct interpretation of the exception clause is the phrase "being administered in January, 1977." In January, 1977, subsections (c) and (f) were being administered by the Social Security Administration by delaying any decision as to whether or not to grant benefits under these subsections until this Court rendered a decision in Goldfarb. The Social Security Claims Manual required the reviewing office to send the following letter to any applicant for subsection (c) and (f) benefits:

The current Law requires that claimants for (widower's) (husband's) benefits meet a one-half support requirement. Some Federal district courts have ruled that this requirement is unconstitutional; however, the Secretary of Health, Education and Welfare has appealed these rulings. On February 23, 1976, the U.S. Supreme Court noted probable jurisdiction of the case of Goldfarb v. Secretary, HEW (#75-699), but we do not expect the Court to hear the case until the fall of 1976. In the meantime, the law remains unchanged

¹⁷The change in length-of-marriage requirements did not occur until December, 1978. Social Security Amendments of 1977, Pub. L. 95-216, § 337(b), 91 Stat. 1548 (1977). The present law bases eligibility upon a marriage that lasted at least 10 years. 42 U.S.C. § 402(b)(1)(G) (Supp. V).

and no payment can be made until a final decision has been rendered on the constitutionality of the one-half support requirement. Even though no payment may currently be made, your claim is being recorded and your rights are being protected. You will be notified of your entitlement or nonentitlement to benefits once the issue is finally resolved.

Social Security Claims Manual Transmittal No. 3844 (July 14, 1976). "If [an applicant] had applied for husband's insurance benefits in January, 1977 and met all the requirements except dependency, his application would have been allowed following the Supreme Court decision in Califano v. Goldfarb." Rosofsky v. Schweiker, 523 F. Supp. 1180, 1183-84 (E. D. N. Y. 1981). Thus, the phrase "as being administered in January, 1977" deferred to the decision of this Court in Goldfarb. After Goldfarb its meaning was clear—there is no gender-based dependency test incorporated into the exception clause.

Appellees have shown that the exception clause can be fairly construed so as not to include a gender-based dependency test. The eligibility requirements "in effect" and "being administered" in January, 1977, did not include proof of dependency. Therefore, the Court should interpret the exception clause as requiring no such proof.

II. If the exception clause of the pension offset provision incorporates by reference a gender-based dependency test, then the exception clause violates the equal protection component of the due process clause of the fifth amendment.

If the exception clause is held to incorporate subsections (c) and (f) as they existed prior to Goldfarb, then the gender-based dependency test has been resurrected, and the exception clause must be held to violate the equal protection component of the fifth amendment. After all, this is the very same dependency test (Former 42) U.S.C. § 402(f)) held unconstitutional by the Court in Goldfarb. Since the Court has not deviated in the slightest degree from that holding, it is evident that, despite its new packaging, the gender-based dependency test is just as unconstitutional today as it was in 1977.

Although the Secretary attempts to portray this dependency test as being in a "different context", the Court should be careful not to allow semantics to alter the obvious. In its new form, the gender-based dependency test discriminates on the basis of sex by requiring a husband to prove dependency before being eligible for inclusion within the exception clause, while requiring no such proof of a wife. Thus, as was the situation prior to Goldfarb, the social security contributions of men are now worth more than the contributions of women. Although the Secretary contends otherwise, "[s]ex is exactly what . . . [the exception clause] is based on." Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 713 (1978) (quoting Manhart v. Los Angeles Department of Water and Power, 553 F. 2d 581, 588 (9th Cir. 1976)).

The touchstone of equal protection has been that "Congress treat similarly situated persons similarly. . . ."

Is is important to note that both Leon Goldfarb and Robert Mathew are retired federal employees. Although the Court's decision in Goldfarb entitled Leon Goldfarb to receive full spousal benefits because the gender-based dependency test sought to be applied to him to deny his spousal benefits was held unconstitutional, the Secretary now contends that the very same gender-based dependency test must be applied to Robert Mathews to deny him spousal benefits. If there is any difference between the equities involved in the cases of Leon Goldfarb and Robert Mathews, then the equities involved in Mr. Mathews' case weigh more heavily in favor of his receipt of full spousal benefits. While Mr. Goldfarb retired at a time in which all men were automatically denied full spousal benefits unless they could prove dependency, Mr. Mathews retired at a time in which all men were granted full spousal benefits without proof of dependency.

Rostker v. Goldberg, 453 U.S. 57, 79 (1981). When a statute treats similarly situated people differently, solely because of differences in gender, the Court's decisions have held "that the traditional minimum rationality test takes on a somewhat 'sharper focus'." Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 468 (1981). Application of this heightened scrutiny to the exception clause requires that the Secretary "carry the burden of showing an 'exceedingly persuasive justification' for the classification." Mississippi University for Women v. Hogan, — U.S. —, 102 S. Ct. 3331, 3336 (1982) (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)).

The Secretary attempts to meet its burden by showing that the dependency test incorporated into the exception clause (1) serves the important governmental objective of protecting reliance interests of retirees²⁰, and (2) is substantially related to the achievement of that objective. Califano v. Webster, 430 U.S. 313, 316-17 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976). Appellees contend that the Secretary has not met this burden.

¹⁹Justice O'Connor, writing for the majority in Hogan, also noted that "[t]he issue is not whether the benefited class profits from the classification, but whether the State's [government's] decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal." Mississippi University for Women in Hogan, — U. S. —, 102 S. Ct. 3331, 3340 n.17 (1982).

²⁰The Secretary also argues that the exception clause "promotes the collective interest of ensuring that citizens have confidence in the just and orderly processes of government." (Appellant's Brief at 34) While this is an admirable goal, there is absolutely no indication in the legislative history of the exception clause that this goal was given even minor consideration. Further, the Secretary offers no explanation as to why a gender-based dependency test is needed to reach this purported goal, even if it had been considered by Congress.

A. The protection of gender-based reliance interests is not an important governmental objective.

As will be shown, the exception clause protects the reliance interests of men and women who are affected by the pension offset provision unequally—it protects the reliance interests of all women, while protecting the reliance interests of dependent men only. If the important governmental objective sought to be furthered by enactment of the exception clause is the protection of reliance interests of all people, both men and women, then the exception clause is unconstitutional because the means chosen are not substantially related to that end. Alternatively, if the governmental purpose sought to be furthered is the protection of gender-based reliance interests, then the exception clause is unconstitutional because protection of gender-based reliance interests is not an important governmental objective.

The Secretary identifies the important governmental objective sought to be furthered by the exception clause as the protection of "legitimate reliance interests of retirees under pre-Goldfarb law." (Appellant's Brief at 33) This objective cannot be an important governmental objective since there is no class of people whose reliance upon pre-Goldfarb law needs to be protected. The only people who relied upon pre-Goldfarb law were those who made their retirement decisions prior to March, 1977, when Goldfarb was decided." These people are not affected by

²¹A comparison of two examples clearly demonstrate this fact. Consider Male A and Female A who retire in February, 1977. There is no doubt that Female A, makes her decision to retire from government employment at a time in which she is eligible to receive the windfall of an unreduced spousal benefit. 42 U.S.C. § 402(b). If Female A planned her retirement on unreduced spousal benefits she did so in reliance upon the (Continued on next page)

the government pension offset, and therefore they do not need to be protected from it.

Although the Secretary repeatedly refers to "reliance interests", no satisfactory explanation is given as to the

(Continued from previous page)

law as it existed in February, 1977. Male A, on the other hand in reaching his retirement decision, does so at the time in which he is ineligible to receive spousal benefits unless he can prove dependency. Female A has no need for the protection of an exception clause since the pension offset does not affect the amount of her spousal benefits. Of course, had the pension offset been drafted in such a way so as to affect her, a legitimate reliance interest on pre-Goldfarb law would be present.

Compare this example with Male B and Female B who retire in October, 1977. The female in this example makes her retirement decision at a time in which she is eligible for unreduced spousal benefits. Goldfarb having not affected the statutory entitlement criteria as it relates to women. Unlike the female in the first example, Female B cannot be said to plan her retirement on the basis of pre-Goldfarb spousal benefit provisions. At most Female B had an expectation under pre-Goldfarb law that when she retired she would receive unreduced spousal benefits. For her the era of pre-Goldfarb entitlement is largely theoretical, since her act in reliance on eligibility, her retirement, occurs in October, 1977. Her reliance is predicated not on pre-Goldfarb eligibility criteria for spousal benefits but on the spousal benefit provisions in force on the date she made her decision to retire-October, 1977. Suprisingly, the pension offset provision does not affect Female B in any way, since her retirement also takes place prior to the effective date of the offset provision. Thus, the exception clause is not designed to protect her act of reliance on a given statutory scheme.

Male B can, as a result of Goldfarb, legitimately make his retirement decision based upon eligibility for unreduced spousal benefits in addition to his government pension. He has no need for an exception clause. The pension offset is not applicable to him since he retired prior to December 1, 1977. Despite any apparent congressional intent to the contrary, Male B will continue to receive both his government pension and spousal benefits for his lifetime.

nature of this interest.²² Ballentine's Law Dictionary (3d ed. 1969) at 1085 defines "reliance" as "[t]rust or confidence, particularly in promises and representations." It further defines "reliance interest" as a "term of art in the law of damages for breach of contract. Expenditures made, or property transferred or consumed, by the party not in default in reliance on the contract." In analogizing this

²²The Secretary has historically been inconsistent in attempting to define the nature of the reliance interest purportedly protected by the exception clause. In Rosofsky, the Secretary explained to the Court:

only persons who could have planned their retirements on the assumption that they would receive unreduced spousal benefits were those who would have been eligible for spousal benefits under the Act as it existed in January, 1977. Those persons receiving government pensions who become eligible for spousal benefits under the Social Security Act solely as a result of the March, 1977 decisions and the December, 1977 amendments must have planned their retirements on the assumption that they would not receive any spousal benefits at all.

Jurisdictional Statement at 12, Schweiker v. Rosofsky (Case 81-1551) (filed February 18, 1982). When the Secretary is faced with a case in which a genuine reliance interest is present, and yet goes unprotected by the exception clause, the emphasis changes. In these cases the Secretary attempts to introduce a quantitative measurement into the definition of "reliance interest" in order to imply that these genuine reliance interests are not legitimate and thus justify to their exclusion from the protection of the exception clause. For example, in Webb the Secretary stated that " gress was justifiably concerned with protecting those persons—primarily wives, but also husbands, dependent on their wives for one-half of their support—who, for a significant period of time, relied on receiving full special benefits, and planned their retirements accordingly." Brief for Appellant at 20, Webb v. Schweiker, 701 F. 2d 81 (9th Cir. 1983) (emphasis added). In Wachtell the Secretary admitted that the loss of spousal benefits by applicants who relied upon the result of the Goldfarb decision would upset some retirement plans, but then attempted to minimize the importance of this frustration of reliance interests by saying that "lew it any plans [would be upset] in a significant say". Reply brief for Appellant at 2, Wachtell v. Schweiker, No. 82-5552 (11th Cir. filed Oct. 12, 1982).

term of art from the law of contracts to the present situation, it can be seen that reliance interests herein are those retirement decisions made and acted on by individuals who depended on the law as it existed at the time their decisions were made, and which decisions and actions would be to their detriment should the law change. By looking at hypothetical pairs of retirees who are themselves governmental workers and whose spouses are covered employees, it can be seen that the exception clause affects the reliance interests of men and women unequally.

Example 1: Male A and Female A retire and file for benefits in November, 1977—8 months after Goldfarb, 1 month prior to enactment of government pension offset, Neither will reach age 62 until December, 1977.

Male A will have his spousal benefits reduced by the amount of his government pension. Female A will receive full, unreduced spousal benefits. ²³ Male A relies upon post-Goldfarb law and retires expecting to receive full spousal benefits. Female A relies upon post-Goldfarb law and retires expecting to receive full spousal benefits. Yet, due to enactment of the exception clause, Male A and Female A, who both relied upon the same law at the same time, are treated disparately. Male A, in whose position

²³Neither Male A nor Female A will be eligible for spousal benefits until they reach age 62. 42 U.S.C. §§ 402(b)(1)(B), 402(c)(1)(B) (Supp. V). As Male A does not reach age 62 until December, 1977, his application is not deemed "filed" until that month. His application is then subject to the pension offset provision which became effective December 1, 1977. Social Security Amendments of 1977, Pub. L. No. 95-216, § 334(f), 91 Stat. 1546 (1977). Since he cannot demonstrate dependency, he will not be eligible for inclusion in the exception clause. Although Female A is in an identical position, she will be eligible for inclusion within the exception clause based upon the assumption that she relied upon pre-Goldfarb eligibility in making her retirement decision. The same presumption will not apply to Male A.

Mr. Mathews finds himself, cannot undo his retirement. Had he known that he would not receive unreduced spousal benefits, he probably would have postponed his retirement to a later date in order to increase the amount of his government pension.

Example 2: Male B and Female B retire in November, 1982—5 years and 6 months after Goldfarb, 4 years and 11 months after enactment of the government pension offset.

Male B will have his spousal benefits reduced by the amount of his government pension. Female B will receive full, unreduced spousal benefits. Again, Male B and Female B make their retirement decisions based on the same law at the same time—they both rely upon the law in effect around November, 1982. Yet Female B receives a windfall benefit based upon her fictional reliance on the law as it was in effect 4 years and 11 months ago. In other words, Female B is protected from the government pension offset which was enacted in December, 1977, whereas Male B is not so protected. Had it not been for the exception clause itself, Female B would not have relied upon the receipt of unreduced spousal benefits while making her retirement decision.

As can be seen from the foregoing hypotheticals, the exception clause protects the reliance interests of similarly situated persons differently, solely on the basis of sex. For Congress to seek to protect the reliance interests of women to a greater extent than the reliance interests of men, it must be shown that such treatment is justified due to past discrimination sought to be ameliorated, Califano v. Webster, 430 U.S. 314 (1977), otherwise, "the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suf-

fer from an inherent handicap or to be innately inferior, [and] the objective itself is illegitimate." Mississippi University for Women v. Hogan, — U.S. —, 102 S. Ct. 3331, 3336 (1982). The Secretary has shown no such compensatory intent. Indeed, it is hard to imagine how reliance interest of non-dependent male government workers could have been favored in the past such that a favoring of the reliance interests of non-dependent female government workers would be justified at present. Therefore, if the governmental objective behind enactment of the exception clause is the protection of gender-based reliance interests, the exception clause is unconstitutional. Such an objective is not an important governmental objective.²⁴

B. The exception clause is not substantially related to the protection of reliance interests of retirees.

If the Court finds that the important governmental objective sought to be furthered by the exception clause is the protection of reliance interests, across the board, rather than protection of gender-based reliance interests, then the exception clause must still be held to violate equal protection—because the means chosen are not substantially related to that end. This violation of equal protection results not from the use of an exception clause but, rather, from the gender-based dependency test employed in the exception clause to determine which persons are eligible for inclusion within its provisions.

²⁴The Secretary's citation to *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166 (1980) is not to the contrary. In *Fritz*, the Court applied the traditional rational basis standard of review since the questioned statute did "not burden fundamental constitutional rights or create 'suspect' classifications." *Id* at 174. A different decision might have been reached had the Railroad Retirement Act of 1974 contained a gender-based dependency test and the Court employed the intermediate standard of review.

The Secretary wrongly contends that the reliance interests of persons who became eligible for spousal benefits as a result of Goldfarb "have been accommodated in the starting date of the offset provision rather than through the exception clause," Appellant's Brief at 39 n. 28, and that those persons who became eligible after Goldfarb and are affected by the pension offset have "no reliance interest to be protected." (Appellant's Brief at 38) This contention is based upon the assumption that, since the exception clause did not take effect until December 1, 1977, any reliance interests formed during the nine months between Goldfarb and enactment of the government pension offset provision are not affected by the government pension offset provision. This assumption is erroneous. It is therefore evident that the exception clause employs an invalid classification because it is based upon an erroueous assumption, and was thereby not "determined through reasoned analysis." Mississippi University for Women v. Hogan, - U.S. -, 102 S. Ct. 3331, 3337 (1982).

This lack of a "reasoned analysis" is further evident upon examination of the legislative history of the exception clause. Such an examination discloses no congressional finding of the existence of any reliance interests based upon pre-Goldfarb law, nor why a five-year exception was needed to protect those interests if they

²⁵Statistics from the Social Security Administration reveal that 5,399 husbands were denied spousal benefits due to the pension offset provision between December 1, 1977 and December 30, 1978. J. Bondar, Initial Effects of Elimination of the Dependency Requirement on Entitlement to Husband's and Widower's Benefits, Research & Statistics Note No. 2 at 11 (SSA Office of Research Statistics, June 28, 1982). There is no empirical data, and the Secretary has offered none, which conclusively demonstrates that none of these applicants premised their retirement on receipt of unreduced spousal benefits.

did exist. All that can be found in the record concerning the existence of a reliance interest based upon pre-Goldfarb law is the statement that "there may be large numbers of women, especially widows in their late fifties . . . whose retirement income was planned for on the assumption of the availability of full wife's or widow's benefits under social security." H.R. Conf. Rep. 95-837, 95th Cong., 1st Sess. 72 (1977), S. Conf. Rep. 95-612, 95th Cong., 1st Sess. 72 (1977) (emphasis added). Furthermore, there is no documentation showing that this presumed reliance interest is any more legitimate than the reliance interests of men such as Mr. Mathews. It is apparent that little, if any, legislative analysis was made of the retirement decision-making process and that this lack of analysis resulted in a statute which does not substantially protect the reliance interests of retirees.26 If the exception

²⁶Instead, the exception clause is primarily the product of a congressional desire to put together a stop-gap measure to buy time until the problem of "windfall" benefits could be further studied and dealt with. This is evident in the modifications made by Congress since 1977 in the area of entitlement to spousal benefits. The first modification occurred in December, 1982, when Congress extended the exception clause for an additional seven months, this time basing eligibility on a non-gender based dependency test. The second modification occurred with the passage of the Social Security Amendments of 1983. These amendments provided for a new pension offset which offset the amount of any spousal benefits by two-thirds the amount of the public pension received by those who became entitled to receive public pensions after June, 1983.

These modifications show, since the gender-based dependency test has been eliminated, that a gender-based dependency test is not necessary to accomplish the important governmental objective embodied in the exception clause. These modifications also show, since the time period during which the exception clause was in effect was extended, that the exception clause was not merely a transitional rule to protect pre-Goldfarb reliance interest. In December, 1982, everyone who had purportedly relied upon pre-Goldfarb law was aware, and had been for five years, that the pension offset provisions would be applied to them beginning in December, 1982.

clause was not based upon a reasoned analysis, then it must have been based upon "the mechanical application of traditional, often inaccurate assumptions about the proper roles of men and women. Mississippi University for Women v. Hogan, — U.S.—, 102 S. Ct. 3331, 3337 (1982).

The Secretary attempts to show that the exception clause employees means which are substantially related to the protection of reliance interests of retirees who planned their retirement upon the assumption that they would receive full spousal benefits. However, the Secretary has failed to show this substantial relationship. It can readily be seen that the exception clause is underinclusive. It does not protect the legitimate reliance interests of several categories of retirees.

Mr. Mathews is a prime example of a category of retirees whose reliance interests go unprotected. Mr. Mathews' retirement decision was made on November 18, 1977. Prior to his retirement he inquired as to his eligibility for spousal benefits and was advised that he was eligible to receive unreduced husband's insurance benefits. Tr. 42 There can be no doubt that at the time Mr. Mathews retired men were eligible for full spousal benefits without proving dependency and that his decision to retire was based in part on the belief that he would be eligible for social security benefits. Although Mr. Mathews relied upon his eligibility to receive full spousal benefits, neither the exception clause nor the effective date of the pension offset provision protect his reliance interest.

The pension offset provision was drafted to "apply with respect to monthly insurance benefits . . . beginning with the month in which this Act is enacted, on the basis of applications filed in or after the month in which this

Act is enacted." Social Security Amendments of 1977, § 334 (f), 91 Stat. 1546 (1977). Since the amendments were enacted on December 20, 1977, the pension offset automatically applied to all applications for spousal benefits filed on or after December 1, 1977. Mr. Mathews filed his application on December 15, 1977. Tr. 42 Although he relied upon entitlement to spousal benefits in making his retirement decision almost a full month prior to December 15, 1977, the effective date of the pension offset provision does not protect his reliance interest. Moreover, the exception clause does not protect Mr. Mathews' reliance interest for the reason that he cannot prove dependency. And Mr. Mathews' case is not an extreme example. The same anomaly was faced by Peter Caloger,27 Sidney Webb,28 and Stanley Wachtell.29 Thus, it is obvious that the exception clause fails to adequately protect genuine reliance interests, and that this failure is the result of its incorporation of a gender-based dependency test which renders the statute underinclusive.

C. The exception clause is a legislative attempt to reinstate a provision previously held unconstitutional, and is therefore unconstitutional itself.

²⁷Peter Caloger retired in August of 1977 but did not file his application for spousal benefits until May, 1978, when his wife first became eligible for a worker's benefit. Caloger v. Harris, 1981 Unempl. Ins. Rep. (CCH) ¶17,754 (D. Md. Mar. 25, 1981).

²⁸Sidney Webb retired from his position with the State of California in March, 1977. He filed an application for spousal benefits in September, 1977 and met all eligibility criteria for entitlement on December 2, 1977. Jurisdictional Statement at 5, Heckler v. Webb, No. 82-2094 (filed June 21, 1983).

²⁹Stanley Wachtell filed his application for spousal benefits on August 23, 1977, but did not meet all eligibility criteria for entitlement until December 1, 1977. Wachtell v. Schweiker, No. 80-8022 (S. D. Fla. Jan. 26, 1982) (See Mot. to Aff. App. C.).

Even assuming that there does exist a class of people who relied upon pre-Goldfarb law, it is not at all clear that this reliance interest is deserving of protection in the manner chosen by Congress. If this class did rely upon pre-Goldfarb law, then it relied upon a law which was unconstitutional as violative of equal protection. If the Court gives effect to Congress' attempt to re-legislate the unconstitutional, then the integrity and finality of the decisions of the judicial branch have been seriously undermined. The door will be opened to allow the legislature, when dissatisfied with a decision of the courts, to legislate away the effects of such a decision.

For example, the State of Mississippi might decide to extend its discriminatory admissions policy at the Mississippi University for Women, notwithstanding the Court's decision in Mississippi University for Women v. Hogan, - U. S. -, 102 S. Ct. 3331 (1982). The Mississippi Legislature could easily accomplish this effect by denying admission of all students to the School of Nursing, but exempting from this denial all students who relied upon their eligibility to attend the School prior to the Court's decision in Hogan. This exemption would have the same effect as the reinstitution of a gender-based dependency test in the exception clause involved in the case at bar. Only female applicants would be eligible for admission, since only female applicants could have had a reliance interest based upon eligibility criteria prior to Hogan. The effect of such an exemption, like the exception clause herein, would be to perpetuate the unconstitutional.

Appellees do not argue that protection of reliance interests is not an important governmental objective. Appellees concede that the Court, in a variety of cases differing from the one at bar, has recognized the importance

of reliance interests which were based upon an old rule of law subsequently changed. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., - U.S. -, 102 S. Ct. 2858 (1982). Procunier v. Navarette, 434 U.S. 555 (1978): Lemon v. Kurtzman, 411 U.S. 192 (1972). However, these cases differ fundamentally from the case now before the Court in that they all involved judicial protection of reliance interests which were based upon a statute or an old rule of law subsequently changed by judicial action. Appellees do not contend that Congress may not also protect reliance interests when it modifies a statute. United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980). Therefore, appellees do not contest the constitutionality of Congress' enactment of an exception clause. What appellees do contest is the constitutionality of an exception clause which reinstitutes a provision previously held unconstitutional by this Court. The exception clause here at issue is objectionable because it not only delays, in the name of reliance interests, the effect of the government pension offset provision, but it also delays the effect of the Court's decision in Goldfarb.30

³⁰Even though the Secretary appears to find support for the proposition that unconstitutional provisions can be given effect for a limited time even after they have been adjudicated unconstitutional (Appellant's Brief 36, 37 n. 27) a closer examination shows that the issue presented in the case at bar has not been decided by this Court. In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., — U. S. —, 102 S. Ct. 2858 (1982), the Court delayed the effect of its decision in order to give Congress time to reconstitute the bankruptcy courts. Id. at 2880. This delay did not allow the continuation of unconstitutional acts—it did not permit bankruptcy judges to continue to adjudicate cases and controversies, like the one in Northern, which were committed to Article III courts. Also, the Court's decision to delay was not based upon the reliance of litigants, like Northern Pipeline, to have their cases decided by a bankruptcy judge. In Lemon v. Kurtzman, 411 U.S. 192 (Continued on next page)

III. The inverse severability clause of the pension offset provision unconstitutionally obstructs the exercise of judicial review.

Because Congress anticipated the possibility that the exception clause would be found unconstitutional, it enacted an accompanying inverse severability clause. This clause is inverse because it directs that upon a finding of unconstitutionality the grace period granted by the exception clause shall be nullified. Social Security Amendments of 1977, Pub. L. 95-216, § 334(g) (3), 91 Stat. 1546 (1977). The effect of such a nullification is to apply the pension offset to all applicants for spousal benefits who had been exempted from its effect and, further, to foreclose recovery by those who successfully challenge the constitutionality of the exception clause. Thus, the purported impact of the inverse severability clause is to preclude a reviewing court, in advance of litigation, from

(Continued from previous page)

^{(1973),} which allowed reimbursement to schools for expenditures made in reliance on an unconstitutional statute, no allowance was made for reimbursement for any future expenses. Thus, the Court did not allow the perpetuation of an unconstitutional statute.

³¹Appellees have chosen the term inverse severability to distinguish the present provision from other severability clauses. The traditional severability clause recognized by the Court provides that if a portion of a statute has been stricken as invalid, the remainder is self-sustaining and capable of enforcement without regard to the stricken portion. The Court, on many other occasions, has affirmed the validity of this type of severability clause. Buckley v. Valeo, 424 U.S. 1 (1976); Welsh v. United States, 398 U.S. 333 (1970); United States v. Jackson, 390 U.S. 570 (1968); McElroy v. United States, 361 U.S. 281 (1959); Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938); Watson v. Buck, 313 U.S. 387 (1941); Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210 (1932); Dorchy v. Kansas, 264 U.S. 286 (1924). By contrast, the severability subsection of the exception clause is an "inverse" provision. Specifically, it seeks to invalidate the entire exception clause if any individual provision is held invalid.

granting any tangible relief from the unconstitutional underinclusiveness of the exception clause to the only class harmed by such underinclusiveness. Because Congress cannot constitutionally impede the exercise of federal judicial power in this way, the inverse severability clause is invalid and cannot be enforced.

The inherent power of an article III court to extend the coverage of an unconstitutionally underinclusive statnte to the class aggrieved by the exclusion is well established and not in dispute here. Califano v. Westcott, 443 U. S. 76, 89 (1979); Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J. concurring). It is true, as the Secretary maintains (Appellant's Brief at 45, 46), that in deciding whether to exercise this power, the Court has generally sought to ascertain and follow the remedial design of the legislature which enacted the classification under review.32 The Court has, for example, given effect to severability clauses which provide that some form of relief be granted the injured parties before it. Califano v. Westcott. 433 U.S. 76 (1979), Welsh v. United States, 398 U.S. 333 (1970), INS v. Chadha, - U.S. -, 103 S. Ct. 2764 (1983). In addition, the Court has remanded initial reso-

J2The Court has also noted that "extension, rather than nullification, is the proper [remedy]" for an underinclusive statute. Califano v. Westcott, 433 U.S. 76, 89 (1979). The Westcott decision noted that the Court "regularly has affirmed District Court judgment ordering that welfare benefits be paid to members of an unconstitutionally excluded class" Id. at 90. Califano v. Goldfarb, 430 U.S. 199 (1977), aff'g 396 F. Supp. 308 (E.D.N.Y. 1975); Califano v. Silbowitz, 430 U.S. 924 (1977), aff'g 397 F. Supp. 862 (S.D. Fla. 1975); Califano v. Jablon, 430 U.S. 924 (1977), aff'g 399 F. Supp. 118 (D. Md. 1975); Weinberger v. Weisenfeld, 420 U.S. 636 (1975), aff'g 367 F. Supp. 981 (D.N.J. 1973); United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973), aff'g 345 F. Supp. 310 (D.D.C. 1972); Richardson v. Griffin, 409 U.S. 1069 (1972), aff'g 346 F. Supp. 1226 (D. Md. 1972).

lution of the question of relief from unconstitutionally underinclusive state statutes to the courts of the states which enacted them. Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 153 (1980); Orr v. Orr, 440 U.S. 268, 271-373 (1979); Stanton v. Stanton, 421 U.S. 7, 17 (1975). But the Secretary cites no case, and appellees have found none, in which this Court has honored an inverse severability clause which purports to prevent a federal court, in advance of litigation challenging the constitutionality of the statute, from awarding any form of tangible relief to members of the only class injured by it.

It is not surprising that the Court has never upheld this type of inverse severability clause such as the one at issue here, for the effect of such a provision is to eviscerate the process of judicial review. In the present case, for example, the men denied spousal benefits by virtue of the underinclusiveness of the exception clause are warned. in advance of litigation, that a successful constitutional challenge to the statutory source of their injury will be fruitless. The inverse severability clause leaves no doubt that these men can vindicate their constitutional right to equal protection only by causing others to forfeit benefits they have previously been entitled to. Few potential litigants who recognize this inevitability will be so committed to the principle of equality, or so callous about the consequences of their own "success", to pursue this sort of abstract and ambiguous vindication of their rights. Even fewer lawyers will be motivated to litigate claims which hold out to their clients no possibility of any tangible return, monetary or equitable.33

³³Even if the deterrent effects of the inverse severability clause are overcome and, as here, a lawsuit challenging the (Continued on next page)

These practical obstacles to the effective exercise of judicial review show that the inverse severability clause is unconstitutional in at least two respects. First, it purports to preclude members of appellees' class from receiving any relief from the unconstitutional injury inflicted on them by the exception clause. Second, the inverse severability clause purports to curtail the jurisdiction of the federal courts to review the constitutional claim of appellees' class by withdrawing the class' standing to sue.

A. The inverse severability clause denies appellees' right to an adequate remedy for an unconstitutionally inflicted injury.

The Secretary maintains that "the issue of relief is not part of the federal constitutional right to equal protection." (Appellant's Brief at 50) Such a contention exhibits an astounding ignorance of the efforts expended

(Continued from previous page) constitutionality of the pension offset provision is filed and is successful on the merits, it is unclear how a reviewing court bound by the clause can gve practical effect to its judgment. There is, for example, serious doubt as to whether a court may properly order termination of federal benefits to a nationwide class of recipients when no member of that class has appeared before the court. Welsh v. United States, 398 U.S. 333, 364 n.16 (1970). See also, LaFrance, Problems of Relief in Equal Protection Cases, 13 Clearinghouse Rev. 438, 440 (1979). If such an order is nonetheless entered, its proper scope is equally problematic. At the least, the court would have to determine whether prospective nullification would be suffi-cient to satisfy the inverse severability clause or whether recoupment of benefits previously paid to the class favored by the exception would also be required. One possible result of these uncertainties is illustrated by Rosofsky v. Schweiker, 523 F. Supp. 1180 (E.D.N.Y. 1981) in which the district court, after holding the pension offset provision unconstitutional and acknowledging the limits imposed by the inverse severability clause, nether extended nor nullified the five-year grace period granted to the class favored by the exception, thus giving no effect at all to the judgment of unconstitutionality. Id. at 1187-88.

by this Court in assuring that persons harmed by violations of equal protection secure relief from that harm. One need look no further than Brown v. Board of Education, 347 U.S. 453 (1954) to see an example of the importance placed by the Court on a constitutionally adequate form of relief for vindication of a violation of the equal protection guarantee.

In Brown the Court was not satisfied to simply issue a declaratory judgment that racial segregation of the public schools was unconstitutional; it ordered that all necessary steps be taken "to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." Brown v. Board of Education, 349 U. S. 294, 301 (1955). Seventeen years later, in Swann v. Charlotte-Meklenburg Board of Education, 402 U. S. 1 (1971), the Court reaffirmed the central role of a proper remedy for the vindication of constitutional rights. Upholding a district court's order requiring district-wide school busing to vindicate the Brown guarantee, the Court stated that

[O]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent equitable remedies . . . as with any equity case the nature of the violation determines the scope of the remedy.

Id. at 15-16.

But the concept that a remedy for the injury inflicted by violation of a constitutional right is an essential part of the right itself was well settled long before *Brown*. It can be traced at least as far back as Blackstone, and through him to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).34 Our jurisprudence has always rested on the proposition that:

Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies to grant the necessary relief. It is also well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for that invasion federal courts may use any available remedy to make good the wrong done.

Bell v. Hood, 327 U.S. 678, 684 (1946).

The independence of the remedial power of the federal courts from obstruction by Congress is also firmly established. The Court has sustained restrictions imposed by Congress on its authority to grant particular remedies for constitutional violations only when there existed alternative, constitutionally adequate remedies by which resulting injuries could be redressed. Cary v. Curtis, 44 U. S. (3 How.) 236, 250 (1945), Lockerty v. Phillips, 319 U. S. 182, 187-89 (1943); Yakus v. United States, 321 U. S. 414, 444 (1944). See also Crowell v. Benson, 285 U. S. 22, 60 (1932); Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L. J. 498, 524-

In the Commentaries on the Laws of England, Blackstone wrote that "[i]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded . . . [It] is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." 3 W. Blackstone, Commentaries *23, *109. Chief Justice Marshall relied on Blackstone's summation for his statement in Marbury that "[t]he very essence of civil liberty lies in the right of the individual to claim the protection of the laws whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws not of men. It will certainly cease to observe this high appellation if the laws furnish no remedy for the violation of a vested legal right." Marbury v. Madison, 5 U. S. (1 Cranch) 137, 163 (1803).

32 (1974); Hart, The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectric, 66 Harv. L. Rev. 1362, 1366-67 (1953).

The proposition that a federal court has the inherent power and responsibility to provide a remedy for an unconstitutionally inflicted injury is the basis for this Court's decisions in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) and its progeny, Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980); and Bush v. Lucas, — U.S. —, 103 S. Ct. 2404 (1983). In Bivens the Court found the authority to fashion a damage remedy against federal officials for violations of fourth amendment rights in both the judicial responsibility to remedy unconstitutional wrongs, supra at 395-96 and in Congress' failure to prescribe an alternative, constitutionally adequate remedy supra at 397.

In Davis, which involved a claim of sex discrimination by a discharged congressional employee, the Court extended the Bivens principle to fifth amendment equal protection rights, of the kind at issue in the present case. Once again the Court emphasized the responsibility of a federal court to afford a remedy for the injury caused by a violation of constitutional rights. Supra at 245. More importantly, the Court approved a damage remedy in Davis despite Congress' deliberate decision to exempt itself from all remedies for employment discrimination that were made available to executive branch employees through Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e-16. Congress' decision to foreclose all statutory remedies to the petitioner in Davis thus did not prevent a federal court from affording her an adequate constitutional remedy. Supra at 247.

Carlson and Bush are in the same vein. In Carlson the Court sustained a damage action for violation of eighth amendment rights, finding the alternative statutory remedy through the Federal Tort Claims Act "not a sufficient protector of the citizen's constitutional rights." Supra at 23. In Bush, while a damage claim for violation of first amendment rights was disallowed, the disallowance was firmly premised on the availability of a wholly adequate alternative statutory remedy for the constitutional violation. Supra at 4756-57.

The Bivens series of cases concerns the availability of damage remedies. But the central principle upon which these cases rest—that a person injured by unconstitutional government action is entitled to an adequate remedy by virtue of the article III powers of the federal courts and by the very nature of the constitutional right itself—plainly governs the case at bar.³⁵

The Secretary nevertheless argues that appellees' class can receive a constitutionally adequate remedy simply by "obtaining a judicial decree that the exception provision violates" the equal protection guarantee. (Appellant's Brief at 48) Their injury is remedied, according to the Secretary, if similarly situated women lose their own eligibility for spousal benefits, for this assures that they are "eligible for Social Security benefits on the same terms as women." (Appellant's Brief at 48, 49) But this argument also disregards the decisions of the

³⁵The Court's recent elaboration of the doctrine of presidential immunity is not to the contrary. In Nixon v. Fitzgerald, — U. S. —, 102 S. Ct. 2690 (1982) the doctrine was found to shield the president completely from damage liability for unconstitutional injuries inflicted by his official acts. Nevertheless, the Court emphasized the importance of the fact that alternative remedies were available to redress the injuries for which damages were sought. Id. at 2704-05 n. 37.

Court which draw a clear distinction between the correction of an unconstitutional classification and the grant of a remedy for the injury caused by such a classification. This distinction is the basis for Justice Harlan's concurring opinion in Welsh v. United States, 398 U.S. 333 (1970). Welsh was an appeal from a criminal conviction of a conscientous objector whose objection to war was based upon ethical, rather than religious beliefs, for his refusal to be inducted into the military. Justice Harlan construed the statute to limit conscientious objector status to only those men whose opposition to war was based on religious belief, but then found the limitation to be an unconstitutional establishment of religion.36 Id. at 354-61. Justice Harlan noted the point pressed here by the Secretary-that the unconstitutionality could be cured either by extending objector status to men like Welsh or by nullifying it entirely. Id. at 361. Nevertheless, extension was "mandated by the Constitution" because it was the only remedy which could relieve Welsh's injury, i.e., reverse his conviction and prison sentence. Id. at 363. Without such a reversal Welsh would be required to "go remediless", an outcome inconsistent with the Court's constitutional duty. Id. at 362.

Welsh was, as noted, a criminal case. Nevertheless, the distinction upon which Justice Harlan's opinion turns is just as applicable to injuries suffered by civil plaintiffs. A generation before Welsh the Court held, for example, that a party injured by the collection of a discriminatory tax in violation of the equal protection guarantee could not be required to settle for an increase in

³⁶The majority in Welsh construed the relevant statute to include Welsh's basis for conscientious objection and accordingly reversed his conviction for refusing induction. 398 U.S. 333, 335-44 (1970).

the tax liability of those favored by the discrimination, though such an increase would cure the unconstitutionality of the tax. Only "a refund of the excess of taxes exacted" would remedy the injury. Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 247 (1931). More recently, the Court unanimously agreed in Orr v. Orr, 440 U.S. 268 (1979) that in order to secure a remedy, and thus to satisfy the injury-in-fact element of article III standing, a party claiming that a statute unconstitutionally withholds a particular benefit (or imposes a particular burden) must at least have a possibility of securing the benefit (or escaping the burden) if the claim is successful. Id. at 272-73, 290-98.

These decisions establish that the injury inflicted by an unconstitutionally underinclusive classification is not the abstract wrong of unequal treatment, but the concrete denial of the benefit it authorizes. They further make clear that nullification of that benefit affords no remedy to those excluded from its enjoyment.³⁷ Applied to the present case, these propositions show that appellees' right to relief from injuries inflicted by the underinclusiveness of the exception clause is violated if the clause is given its purported effect. The inverse severability clause is, for this reason, unconstitutional and cannot be enforced.³⁸

³⁷Even if denial of spousal benefits to women situated similarly to appellees' class can in some sense be described as a remedy, the relevant standard is whether the remedy is constitutionally adequate. Carlson v. Green, 446 U. S. 14 (1980). If the only avenue of redress available to a victim of unconstitutional government action is too narrow, burdensome, or risky to operate as a significant deterrent to the commencement of challenging litigation, its very niggardliness violates this standard. See, e. g., Oestereich v. Selective Service System Local Board No. 11, 393 U. S. 233, 238 (1968).

³⁸The doctrine of sovereign immunity does not defeat the right of appellees' class to an adequate remedy. The class seeks (Continued on next page)

B. By purporting to deny an injured litigant standing to sue, the inverse severability clause is an unconstitutional attempt to curtail the jurisdiction of the federal courts.

In order to satisfy "the case or controversy" prerequisite to article III jurisdiction, a litigant must demonstrate that the government action complained of causes a "distinct and palpable injury," Warth v. Seldin, 422 U.S. 490, 501 (1975), "that is likely to be redressed by a favorable decision." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976). See also, Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978). This requirement means that a party who places a question before a federal court must "stand to profit in some personal interest" from its resolution "else the exercise of judicial power would be gratuitous." Simon v. Eastern Kentucky Welfare Rights Organization, Supra at 39. Thus, a litigant who challenges the constitutionality of an underinclusive statutory classification must stand at least a chance of securing the benefit conferred by the classification if the challenge is successful. Orr v. Orr, 440 U.S. 268, 272-73 (1979).

(Continued from previous page) no damages from the United States, but, rather, declaratory and injunctive relief against the enforcement of the exception clause and its accompanying inverse severability clause and those spousal benefits which flow directly from such declaratory and injunctive relief. Sovereign immunity does not bar these remedies. United States v. Testan, 424 U. S. 392 (1976); Weinberger v. Salfi, 422 U. S. 749, 760-61 (1975). Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682 (1949). In any event, sovereign immunity may not be invoked where its effect would be to bar persons injured by an unconstitutional action of the federal government from securing any relief whatever from that injury. United States v. Testan, supra at 399-407 (1976); United States v. Lovett, 328 U. S. 303, 312-16 (1946).

By purporting to nullify the grace period established by the exception clause in the event that it is found unconstitutional, the inverse severability clause makes it clear that persons who lose spousal benefits by virtue of the offset enjoy no possibility of either regaining those benefits or profiting in any other tangible sense from a successful constitutional challenge to the genderbased dependency test re-enacted in the exception clause. In short, the inverse severability clause, if binding on a reviewing court, deprives those hurt by the exception clause of standing to challenge it, and thus strips the Court of jurisdiction to hear their constitutional claim. By foreclosing, in advance of litigation, all forms of relief to those harmed by the statute, Congress has thus purported to immunize an arguably unconstitutional statute from judicial review-not only in the practical sense that no one has a tangible interest in challenging its constitutionality, but also in the theoretical, jurisdictional sense that no one has a right to.

For this reason, the severability clause amounts to an impermissible attempt to curtail the jurisdiction of the federal courts in cases raising a constitutional question. While the "exceptions" clause of article III grants Congress substantial power to define the subject matter jurisdiction of this court and of the lower federal courts, Congress cannot, consistent with the constitutional plan, exercise this power in ways that prevent the vindication of constitutional rights. Cf. Johnson v. Robison, 415 U.S. 361, 363 (1974). See also, Hart, The Power of Congress to Limit the Jurisdiction of the Federal Courts, 66 Harv. L. Rev. 1362, 1365; Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L. J. 498 (1974), Ex Parte McCardle, 74 U.S. (7)

Wall.) 506, 515 (1869); United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). But see also, Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850); Lauf v. E. G. Shinner & Co., 303 U.S. 323 (1938). 39

Moreover, even if the withdrawal of standing to sue purportedly effected by the inverse severability clause is not viewed as a formal limitation of jurisdiction, but simply as an attempt to render extension of the grace period a nonjusticiable remedy, it still cannot survive constitutional scrutiny. When congressionally imposed restrictions on justiciability purport to prevent courts from enforcing constitutional limitations, they cannot, consistent with the institution of judicial review, be honored. 40 United States v. Lovett, 328 U.S. 303, 314 (1946).

By focusing on the impact of the inverse severability clause on the competency of the federal courts, appellees do not mean to suggest that the Constitution requires

³⁹Even if it is permissible for Congress to curtail the jurisdiction of the federal courts to decide constitutional claims, the withdrawal of standing effected by the inverse severability clause also purports to preclude review by state courts. Because the power of state courts to grant relief against federal officials remains uncertain, see *Tarble's Case*, 80 U. S. (13 Wall.) 397 (1872), this added restriction may have little independent effect in this case. Nevertheless, the thrust of the inverse severability clause is to destroy the competence of all courts to remedy violations of constitutional rights.

⁴⁰The Secretary argues that the inverse severability clause does not deprive appellees' class of standing to sue because it is "not an inexorable command" and because it may not "apply in the particular circumstances of a given case." (Appellant's Brief at 47, 48) The Secretary does not explain, however, how the clause can fail to be an "inexorable command" but at the same time be a "considered policy choice" of Congress, binding on the district court in this case. (Appellant's Brief at 50). Nor does the Secretary explain why the inverse severability clause might not be applied to persons falling within its terms, unless it is, as appelleus maintain, unconstitutional. The Secretary's attempt to avoid the jurisdictional implications of the clause is thus unpersuasive.

that someone, somewhere, be afforded standing to challenge every instance of its violation, else that violation goes unreviewed. United States v. Richardson, 418 U.S. 166 (1974). Nor do appellees claim that all violations of the personal rights guaranteed by the Bill of Rights must be susceptible of judicial correction. Valley Forge, College v. Americans United for Separation of Church & State, 454 U.S. 464, 489 (1982). Appellees' argument is, rather, that when such violations cause particular persons tangible harm, here the loss of social security spousal benefits, an attempt by Congress to preclude the award of a remedy for that harm, and thus to deny the persons injured standing to sue, ought to be viewed as an impermissible exercise of the "exceptions" power of article III because it frustrates the vindication of constitutional rights.

C. Invalidation of the inverse severability clause does not intrude on the power of Congress to direct specific remedies for constitutional violations.

Invalidation of the inverse severability clause does not affect Congress' ultimate power to specify the appropriate remedy for the unconstitutional underinclusiveness of the exception clause. Should this Court affirm the judgment of the district court, Congress obviously retains the power to respond by abolishing the exception clause entirely. Such a prospective repeal of the exception clause would effectively override judicial extension of benefits to the appellees without either denying their class a remedy for the period the exception was in effect or undermining their standing to challenge the constitutionality of the exception clause. The Secretary's charge that the district court "has improperly intruded upon the powers of a co-equal branch of government" is thus misplaced. (Appellant's Brief at 50)

Congress also remains free to prescribe remedies in advance of litigation challenging the constitutionality of an underinclusive classification, so long as the remedies prescribed do not undercut the right of persons harmed by the classification to some form of constitutionally adequate relief.⁴¹ The only remedial course foreclosed to Congress is the one chosen in this case: an attempt to preclude, in advance of litigation, the award of any remedy at all to the only class harmed by the underinclusiveness.⁴²

This narrow limitation on congressional discretion poses no threat to the deliberate exercise of legislative remedial prerogatives. Presumably, the 95th Congress

⁴¹Thus, Congress was not inevitably required to provide for the extension of the exception clause in the event its gender-based dependency test was held unconstitutional. Congress conceivably could have, instead, authorized a damages remedy to compensate excluded men for harms suffered as a consequence of the loss of expected spousal benefits. Alternatively, Congress might have ordered restitution of a portion of the Social Security taxes paid by or on behalf of their spouses. The validity of either of these options is, of course, wholly hypothetical, but the standard by which they would be measured—the responsibility of the legislature to provide an adequate remedy for unconstitutionally inflicted wrongs—is not. Carlson v. Green, 446 U. S. 14 (1980), Bush v. Lucas, — U. S. —, 103 S. Ct. 2404 (1983).

⁴²The use of an inverse severability clause like the present one, in conjunction with an underinclusive classification which adversely affects two classes of persons with interests directly opposed to one another, does not present the constitutional problems at issue in this case, where the underinclusiveness of the exception clause harms only one class, that represented by appellee Mathews. See e. g., Orr v. Orr, 440 U. S. 268 (1979). For when an underinclusive classification is susceptible of challenge by two opposed classes, the effect of a clause which prescribes either extension of the benefit or nullification of the burden it allocates is simply to delineate which of the two opposed classes is to be viewed as injured by the underinclusiveness and thus entitled to a remedy in the event it is found unconstitutional. *Id.* at 290-98 (Rehnquist, J., dissenting).

which enacted the pension offset provision, its exception clause, and accompanying inverse severability clause was aware that the effect of the clause would be to stifle incentive to challenge the gender-based dependency test enacted in the exception clause. The 95th Congress can also fairly be charged with the knowledge that this disincentive would work to assure that the harsh remedial choice envisioned by the severability clause would never have to be invoked. In fact, the clause has not been invoked by any reviewing court and no spousal benefits have been suspended or terminated pursuant to its command. Under these circumstances, the inverse severability clause can hardly, despite its facial clarity, be considered a reliable indication of Congress' remedial intention in the event the exception clause is declared unconstitutional. It might, instead, be more accurately viewed as a legislative "bluff" not necessarily indicative of the remedial wishes of a Congress actually faced with indicial invalidation of the exception clause. Effective exercise of judicial review requires that the bluff be called.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,
ROBERT W. BUNCH
JOHN R. BENN
Peck, Slusher & Bunch
118 West Dr. Hicks Boulevard
Florence, Alabama 35630
(205) 766-4490

Bruce K. Miller
Western New England CollegeSchool of Law
Springfield, Massachusetts 01119
(413) 782-3111

Attamena for Annelless

No. 82-1050

Office - Supreme Court, U.S. FILED NOV 22 1993

ALEXANDER L STEVAS

ERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

V

ROBERT H. MATHEWS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

REPLY BRIEF FOR THE APPELLANT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

rage
ses:
Ambrose v. Califano, [1980-1981 Transfer Binder] Unempl. Ins. Rep. (CCH) para. 17702 (D. Ore. Jan. 29, 1980)
Arizona Governing Committee v. Norris, No. 82-52 (July 6, 1983)
Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388
Califano v. Aznavorian, 439 U.S. 170 14
Califano v. Goldfarb, 430 U.S. 199
Califano v. Jobst, 434 U.S. 47
Califano v. Webster, 430 U.S. 313
Califano v. Westcott, 443 U.S. 76 17, 18
Carter v. Carter Coal Co., 298 U.S. 238 17, 18
Chevron Oil Co. v. Huson, 404 U.S. 97 6
Chicot County Dist. v. Bank, 308 U.S. 371
Cooper v. Califano: 81 F.R.D. 57
Craig v. Boren, 429 U.S. 190
Dames & Moore v. Regan, 453 U.S. 654 16
Davis v. Wallace, 257 U.S. 478
Electric Bond & Share Co. v. SEC, 303 U.S. 419

	Pag	ge
Cases	—Continued:	
1	FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775	
1	Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380	9
1	FHA v. The Darlington, Inc., 358 U.S. 84	2
,	Frock v. United States Railroad Retirement Board, 685 F.2d 1041, cert. denied, No. 82-756 (Feb. 22, 1983)	7
(Board, 631 F.2d 512	7
(Givens v. United States Railroad Retirement Board, No. 82-2183 (D.C. Cir. Oct. 28, 1983)	7
(Griffin v. Illinois, 351 U.S. 12	ϵ
. 1	Hill v. Wallace, 259 U.S. 44	8
1	Hospital Association of New York State, Inc. v. Toia, 577 F.2d 790	2
1	Kirchberg v. Feenstra, 450 U.S. 455	0
1	Lehr v. Robertson, No. 81-1756 (June 27, 1983)	3
1	emon v. Kurtzman, 411 U.S. 192	6
1	Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702	0
1	Massachusetts Board of Retirement v. Murgia, 427 U.S. 307	4
1	Mathews v. Diaz, 426 U.S. 67 1	4
1	Mertz v. Harris, 497 F. Supp. 1134	5

	Page	,
a	ses—Continued:	
	Mississippi University for Women v. Hogan, No. 81-406 (July 1, 1982)	2
	Mueller v. Allen, No. 82-195 (June 29, 1983)	,
	Nixon v. Fitzgerald, 457 U.S. 731 16	,
	Norton v. Shelby County, 118 U.S. 425 5	,
	Oliver v. Califano, [1977-1978 Transfer Binder] Unempl. Ins. Rep. (CCH) para. 15244 (N.D. Cal. June 24, 1977)	
	Orr v. Orr, 440 U.S. 268	,
	Schweiker v. Hansen, 450 U.S. 785 18-19	
	Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26	
	Sloan v. Lemon, 413 U.S. 825	
	Stanton v. Stanton, 421 U.S. 7	
	United States Railroad Retirement Board v. Fritz, 449 U.S. 166	
	Vance v. Bradley, 440 U.S. 93 14	,
	Weinberger v. Salfi, 422 U.S. 749 14	
	Welsh v. United States, 398 U.S. 333 17, 18	
	Yates v. Califano, 471 F. Supp. 84 4	
	Zenith Radio Corp. v. United States, 437 U.S. 443	

Page
Constitution, statutes and regulations:
U.S. Const. :
Art. III 17
Amend. I
Amend. V (Due Process Clause) 7
Social Security Act Amendments of 1939, Pub. L. No. 379, ch. 666, 53 Stat. 1360
Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509, 42 U.S.C. (Supp. V) 301 et seq.:
§ 334, 91 Stat. 1544 (42 U.S.C. (Supp. V) 402 & note)
(Supp. V) 402 note)
(42 U.S.C. (Supp. V) 402 note) 3
§ 334(g)(3), 91 Stat. 1547 (42 U.S.C. (Supp. V) 402 note)
(Supp. V) 402(b)(1)(G), 416(d)) 4
42 U.S.C. (Supp. V) 402 4
42 U.S.C. 402(b)(1)(G) 4
42 U.S.C. 416(d)
45 U.S.C. 231b(h)(3) 7
45 U.S.C. (Supp. V) 231b(h)(6) 7
44 Fed. Reg. 34479 (1979) 4
45 Fed. Reg. 68931 (1980) 5
47 Fed. Reg. 12161 (1982)

M

	Page
cellaneous:	
123 Cong. Rec. (1977):	
pp. 35396-35397	
Congressional Research Service, Library of Congress, Report No. 83-111 EPW, The Government Pension Offset in Social Security (Mar. 24, 1981, updated June 17, 1983)	12
Ginsburg, Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation, 28 Clev. St. L. Rev. 301 (1979)	11-12
H.R. Conf. Rep. 95-837, 95th Cong., 1st Sec. (1977)	
H.R. Conf. Rep. 97-208, 97th Cong., 1st Sec. (1981)	
S. Conf. Rep. 95-612, 95th Cong., 1st Sess. (1977)	10, 17
S. Rep. 95-572, 95th Cong., 1st Sess. (1977)	12
Social Security Administration Claims Man Transmittal No. 3844 (July 14, 1976)	

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1050

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

ν.

ROBERT H. MATHEWS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

REPLY BRIEF FOR THE APPELLANT

At issue in this case is the pension offset section of the Social Security Amendments of 1977, Pub. L. No. 95-216, § 334, 91 Stat. 1544, 42 U.S.C. (Supp. V) 402 & note. The district court held unconstitutional two provisions of the statute. First, the court invalidated the exception clause (§ 334(g)(1), 91 Stat. 1546) to the pension offset as a violation of due process because it incorporated the genderbased dependency standard that existed in the Social Security Act prior to Califano v. Goldfarb, 430 U.S. 199 (1977). In addition, the court struck down on separation-of-powers grounds the severability clause (§ 334(g)(3), 91 Stat. 1547) that provides that, if the exception is held invalid, the offset should remain in effect and the exception should be eliminated in its entirety. Based on these rulings, the district court extended the exception to apply to nondependent men such as appellee and thereby entitled them to receive dual government pension and Social Security spousal benefits.

In our opening brief we demonstrated that the district court correctly construed the exception clause to incorporate the gender-based standard of pre-Goldfarb law. However, the court erred in concluding that this classification, in the context of the exception clause, violates due process. In contrast to the provision invalidated in Goldfarb, the exception clause does not rest on stereotypes and outdated assumptions regarding women but instead is substantially related to the important governmental objective of protecting the reliance interests of retirees who had planned their retirements under pre-Goldfarb law. Furthermore, the severability clause is a valid expression of legislative intent on the meaning and application of the statute in the event the exception is held invalid in any respect. Thus, if the exception is unconstitutional, the severability clause renders the offset applicable without qualification, and the district court erred in enlarging the scope of the exception and extending dual benefits to appellee's class in the face of Congress's express directive to the contrary.

1. Relying upon the maxim that a court should adopt a reasonable construction of a statute that avoids constitutional questions, appellee urges (Br. 15-25) that, as a matter of interpretation, the exception clause should be read not to incorporate the gender-based dependency test in pre-Goldfarb law. Accordingly, he contends that the exception is applicable to nondependent men.

This contention is plainly wrong. Indeed, appellee's treatment of the issue is most notable for the fact that it virtually ignores the legislative history of the statute. Apart from describing the course of the legislation through Congress (Appellee Br. 17-19 n. 11), appellee refers to the history and congressional understanding of the statute only in passing (id. at 19-20 n. 12). As we demonstrated in our opening brief (Gov't Br. 15-27), the history of the statute, as well as its language, overwhelmingly establishes that the exception

incorporates the pre-Goldfarb standard and was specifically intended to exclude nondependent men. In light of that discussion, it is simply untenable for appellee to assert that there was "no intent by Congress to limit the operation of the exception clause by factoring out * * * men" (Appellee Br. 18-19) and that "[t]he legislative history of the exception clause evidences a primary congressional concern for men like Mr. Mathews" (id. at 19 n. 12).

Moreover, appellee's argument fails to accord any significance to Congress's choice of January 1977 — a time prior to the Goldfarb decision — as the operative date in the exception clause. The only plausible explanation for this provision is that Congress, mindful of the March 1977 decision in Goldfarb, deliberately designed the exception to incorporate the gender-based dependency test in pre-Goldfarb law. See Gov't Br. 24-27. And, contrary to appellee's contention, the statutory language makes clear that it is the law "as it was in effect and being administered in January 1977" (§ 334(g)(1)), not the law "at the point in time in which the exception clause was enacted" (Appellee Br. 22), that is controlling; in January 1977, the Social Security Act required men but not women to prove dependency in order to qualify for spousal benefits (see Gov't Br. 2, 17).

Finally, appellee's interpretation would defeat the fundamental purpose of the statute. Under his view, men and women equally would fall within the exception clause, and the only people who would be excluded from the exception and hence subject to the offset—would essentially be those

^{&#}x27;Appellee argues (Br. 17) that Congress would have explicitly included a dependency requirement in the exception clause if it had intended to impose a gender-based standard. However, Congress's approach of incorporating the pre-existing standards of January 1977—which encompass criteria other than dependency — serves to reinforce its conception that reliance on prior law, rather than gender, was the principle underlying the exception clause.

in categories that were not entitled to spousal benefits when the statute was enacted in December 1977 but that subsequently were made eligible for benefits (see Appellee Br. 23-24). Because it would render the offset inapplicable to then-existing beneficiary categories, appellee's interpretation is irreconcilably at odds with Congress's intent to eliminate the windfall benefits for nondependent men and ease the severe financial burden on the Social Security trust fund that resulted from the Goldfarb decision. In fact, his construction would leave the Social Security system in the same fiscal plight that prompted congressional action in the first place. And appellee has pointed to nothing in the statute or legislative history to suggest that the offset was designed merely to apply to such new beneficiary categories as might be recognized in the future; indeed, the only two beneficiary categories cited by appellee (Br. 23-24) that could have been known to Congress at the time - divorced wives married more than ten but less than 20 years, and divorced husbands2 — are not even mentioned in the legislative history

²Prior to the 1977 Social Security Amendments, a divorced wife was entitled to spousal benefits only if she had been married for at least 20 years. 42 U.S.C. 402(b)(1)(G), 416(d). The 1977 Amendments reduced this durational requirement to ten years, to be effective in December 1978. Pub. L. No. 95-216, § 337, 91 Stat. 1548, 42 U.S.C. (Supp. V) 402(b)(1)(G), 416(d). Thus, when it enacted the offset and exception clauses in Section 334(g) of the 1977 Amendments, Congress was well aware of this new beneficiary category that was not then entitled to spousal benefits but would become eligible for benefits in the future.

Divorced husbands became entitled to spousal benefits as a result of the June 1977 decision in Oliver v. Califano, [1977-1978 Transfer Binder] Unempl. Ins. Rep. (CCH) para. 15244 (N.D. Cal. June 24, 1977); see also 44 Fed. Reg. 34479 (1979) (regulation implementing Oliver on nationwide basis). The other beneficiary categories referred to by appellee were established by judicial decisions subsequent to enactment of the 1977 Amendments. See Cooper v. Califano, 81 F.R.D. 57 (E.D. Pa. 1978), and 87 F.R.D. 107 (E.D. Pa. 1980) (young husbands); Yates v. Califano, 471 F. Supp. 84 (W.D. Ky. 1979) (surviving divorced

of the offset and exception clauses, let alone identified, as appellee would have it, as the focus of the offset provision.

Nevertheless, appellee assures the Court that his proffered interpretation is "the better reading of the statute" (Br. 21). First, he contends that the gender-based standard invalidated in Goldfarb was " 'as inoperative as though it had never been passed' " (Appellee Br. 22, quoting Norton v. Shelby County, 118 U.S. 425, 442 (1886)) and therefore could not be incorporated in the exception clause as a requirement of the Social Security Act that was, in the language of the clause, "in effect * * * in January 1977." However, as shown in our opening brief, there can be no doubt from the text and history of the statute that Congress intended the exception clause to incorporate by reference the pre-Goldfarb requirements, including, in particular, the gender-based dependency test; appellee's reliance on general legal maxims does not negate the specific evidence of Congress's intent in this statute.3 Moreover, appellee's reliance on Norton v. Shelby County is unavailing and reflects an outmoded view of the law. The Court no longer " 'indulge[s] in the fiction that the law now announced has

fathers); 45 Fed. Reg. 68931 (1980). See also Meriz v. Harris, 497 F. Supp. 1134 (S.D. Tex. 1980) (remarried widowers); Ambrose v. Califano, [1980-1981 Transfer Binder] Unempl. Ins. Rep. (CCH) para. 17702 (D. Ore. Jan. 29, 1980) (surviving divorced husbands); 47 Fed. Reg. 12161 (1982). Surely there is no reason in the 1977 statute or its history to assume, as appellee contends, that Congress directed the offset to categories that were neither entitled nor anticipated to become entitled to benefits.

The exception also refers to provisions of the Act "being administered in January 1977." This language — which is discussed below (see p. 6, infra) — further rebuts appellee's argument that the pre-Goldfarb dependency test is not incorporated in the exception clause because an unconstitutional statute is never "in effect." Indeed, Congress's formulation of the exception in terms of requirements "in effect" and "being administered" may well have been devised in anticipation of the objection that appellee now raises.

always been the law * * *." Chevron Oil Co. v. Huson, 404 U.S. 97, 107 (1971), quoting Griffin v. Illinois, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring in the judgment). Rather, "[t]he actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." Chicot County Dist. v. Bank, 308 U.S. 371, 374 (1940). See also Lemon v. Kurtzman, 411 U.S. 192, 199 (1973) (plurality opinion). Nothing in the doctrine of retroactivity suggests that Congress could not or did not incorporate into the exception clause the gender-based dependency test in pre-Goldfarb law.

Appellee further argues (Br. 24-25) that the Social Security Act, as "being administered in January 1977," did not contain a gender-based dependency test for spousal benefits. This contention is incorrect and is refuted by the very authority cited by appellee. As the relevant Social Security Claims Manual states, "[t]he current law requires that claimants for (widower's) (husband's) benefits meet a one-half support requirement. * * * [While that requirement has been challenged], the law remains unchanged and no payment can be made until a final decision has been rendered on the constitutionality of the one-half support requirement. * * * [N]o payment may currently be made • • • ." Social Security Administration Claims Manual Transmittal No. 3844 (July 14, 1976). That the Social Security Administration was holding claims until "the issue is finally resolved" (ibid.) does not, as appellee suggests, alter the fact that the spousal benefits provisions were "being administered in January 1977" in accordance with the requirements set forth by Congress in the Act and that no spousal benefits were being paid to male claimants who failed to demonstrate one-half dependency on their wives.

Nor, finally, does Gebbie v. United States Railroad Retirement Board, 631 F.2d 512 (7th Cir. 1980), support appellee's interpretation of the exception clause (see Appellee Br. 23 n.16). In that case, Congress provided in the Railroad Retirement Act of 1974 that dual benefits under both the railroad retirement and Social Security programs could be paid if the applicant was entitled to Social Security benefits under the law "as in effect on December 31, 1974" (45 U.S.C. 231b(h)(3)). The court of appeals concluded that this language did not incorporate the dependency test that was, subsequent to enactment of the statute, invalidated in Goldfarb. Gebbie, however, involved an entirely different statute from the one at issue here and sheds no light on Congress's intent in enacting the exception clause; in particular, the 1974 statute involved in Gebbie preceded this Court's decision in Goldfarb, and there was no evidence in that case, as there is in this, that Congress framed the statute—including its operative date — to incorporate the requirements of the Social Security Act as they existed prior to Goldfarb.4

2. In our opening brief we showed (Gov't Br. 27-42) that Congress, in enacting the pension offset provision, adopted the exception clause in order to protect the reliance interests of retirees who had planned their retirements under pre-Goldfarb law. Because the protection of reliance interests is

^{*}Following Gebbie, Congress amended the Railroad Retirement Act to eliminate dual benefits for claimants whose entitlements had not been determined by August 13, 1981. 45 U.S.C. (Supp. V) 231b(h)(6). In enacting this amendment, Congress made clear its disapproval of the decision in Gebbie. See, e.g., H.R. Conf. Rep. 97-208, 97th Cong., 1st Sess. 863 (1981). This amendment has been upheld against a challenge, similar to the one in this case, that it "grandfathered" in people who had qualified under the gender-based standard and therefore violates the Due Process Clause. See Frock v. United States Railroad Retirement Board, 685 F.2d 1041, 1046-1049 (7th Cir. 1982), cert. denied, No. 82-756 (Feb. 22, 1983); Givens v. United States Railroad Retirement Board, No. 82-2183 (D.C. Cir. Oct. 28, 1983).

a legitimate and important governmental objective,⁵ and because the exception clause is narrowly tailored and substantially related to the achievement of that objective and is not based on archaic and inaccurate sexual stereotypes, the exception does not violate due process. See also *Lehr* v. *Robertson*, No. 81-1756 (June 27, 1983), slip op. 17-19.

Although appellee acknowledges that the protection of reliance interests is a legitimate and important governmental objective (Appellee Br. 29 n. 21, 38), he contends that the exception clause (if construed to incorporate a gender-based standard) is unconstitutional (id. at 25-39). Appellee argues that "[s]ex is exactly what . . . [the exception clause] is based on' "(id. at 26 (brackets and omission in original), quoting Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 713 (1978)), and he emphasizes that men and women are treated differently under the exception (Appellee Br. 3, 26, 28, 31-32). These observations, however, merely state but do not resolve the issue of the validity of the gender-based standard in the exception clause.

Nor is this case controlled, as appellee suggests (Br. 37-39), by the decision in *Goldfarb*. As we discussed in our opening brief (Gov't Br. 31, 42 n.30), *Goldfarb* arose in a much different context and involved quite different considerations that distinguish it from the present case. Nothing in *Goldfarb* compels the conclusion that the exception clause—which substantially serves legitimate and important governmental objectives and does not reflect a sexist

³See Arizona Governing Committee v. Norris, No. 82-52 (July 6, 1983), slip op. 1-2 (per curiam); id. at 11-13 (Powell, J., concurring in part and dissenting in part); id. at 3-5 (O'Connor, J., concurring); Zenith Radio Corp. v. United States, 437 U.S. 443, 457 (1978); FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 803-809 (1978).

motivation or discredited assumptions about women — violates due process.6

Appellee contends that the protection of "gender-based reliance interests" under pre-Goldfarb law is "not an important governmental objective" (Br. 28). We do not thinkand, more importantly, Congress did not think - that the interests of retirees can be so easily dismissed. Peopleboth men and women - eligible under pre-Goldfarb law were entitled to plan their retirements in accordance with the longstanding statutory provision for unreduced spousal benefits that had been duly enacted by Congress.7 That a closely divided Court ultimately invalidated this provision on equal protection grounds neither detracts from the good-faith reliance on the statutory entitlement while it was in effect nor discredits Congress's effort to protect such reliance interests by means of the exception to the offset. See cases cited at pp. 5-6, supra. Notwithstanding appellee's contention (Br. 28, 38), the protection of reliance interests that reflect previous gender discrimination is not an illegitimate or unimportant governmental objective. See Arizona Governing Committee v. Norris, slip op. 1-2 (per

For these reasons, appellee's characterization that "[t]he exception clause is a legislative attempt to reinstate a provision previously held unconstitutional" (Br. 37) is incorrect. Furthermore, Congress has not sought to override the decision in Goldfarb, and indeed it amended the Social Security Act to remove the sections struck down by the Court (see Gov't Br. 2). Thus, nondependent men are eligible for spousal benefits, with the amount of the benefit determined in light of the offset and exception clauses (and nondependent men who filed valid applications for spousal benefits before December 1977 are entitled to dual pension and Social Security benefits without regard to the offset).

^{&#}x27;See Gov't Br. 33-34 & n.21. See also 123 Cong. Rec. 35396-35397 (1977) (remarks of Rep. Rousselot in connection with the formation of a national commission on Social Security problems) ("the average wage earner today treats his social security taxes as a pension investment and reduces his private savings accordingly"); cf. Arizona Governing Committee v. Norris, slip op. 4 (O'Connor, J., concurring).

curiam); id. at 11-13 (Powell, J., concurring in part and dissenting in part); id. at 3-5 (O' Connor, J., concurring); Los Angeles Department of Water & Power v. Manhart, 435 U.S. at 718-723; see also Kirchberg v. Feenstra, 450 U.S. 455, 459 (1981); id. at 463 (Stewart, J., concurring in the result).

Appellee's brief also reveals a misunderstanding of the nature of this reliance. Contrary to his repeated statements (Br. 28-29 & n.21, 31-32), the relevant reliance interest is that of retirees who planned their retirements in accordance with pre-Goldfarb law. Thus, one cannot merely look, as appellee suggests, to the law in effect at the moment of retirement, and it is simply incorrect to conclude that people who retired after Goldfarb had not relied on pre-Goldfarb law (Appellee Br. 28, 31). Rather, as Congress clearly recognized, planning for retirement occurs over a long period of time and cannot be abruptly changed; accordingly, the exception was designed to "avoid | penalizing people who are already retired, or close to retirement, from public employment and who cannot be expected to readjust their retirement plans to take account of the 'offset' provision that will apply in the future." H.R. Conf. Rep. 95-837, 95th Cong., 1st Sess. 72 (1977); S. Conf. Rep. 95-612, 95th Cong., 1st Sess. 72 (1977).8

Appellee finally contends (Br. 33-37) that the exception clause is fatally underinclusive because it does not protect the reliance interest of men who might have relied on Gold-farb in retiring during the nine-month period between that

^{*}Furthermore, in light of the nature of retirement planning, Congress's choice of a five-year transitional period for the exception clause was reasonable and appropriate (see Gov't Br. 39), and appellee's unsupported suggestions to the contrary (Br. 32, 34-35) are without merit.

decision and enactment of the offset statute. Viewed in context, however, this claim of underinclusiveness does not render the exception unconstitutional.

As we showed in our opening brief (Gov't Br. 20-27. 32-34, 38-40), the exception clause was designed to protect the reliance interests of retirees who had planned their retirements in accordance with pre-Goldfarb law, under which they were entitled to receive unreduced spousal benefits as well as government pension payments. This entitlement was based on statutory provisions that Congress had passed in 1939 and that had remained in effect since that time. See Social Security Act Amendments of 1939, Pub. L. No. 379, ch. 666, 53 Stat. 1360. In view of this longstanding statutory entitlement. Congress could properly determine that retirement plans made under pre-Goldfarb law should be safeguarded from the offset and that such plans in all likelihood reflected the anticipated receipt of unreduced spousal benefits. In contrast, at the time the exception was under consideration in Congress, Goldfarb had only recently been decided and thus was unlikely to have led to widespread and substantial reliance by nondependent men. Moreover, there existed the possibilityas in fact occurred—that Congress would pass legislation in response to Goldfarb and the resulting financial burden on the Social Security trust fund10 and that such measures

⁹Appellee studiously avoids stating directly that he in fact set his retirement for November 1977 in reliance on Goldfarb. See Appellee Br. 2, 26 n. 18, 32, 36. We also point out that many members of the class to whom the district court awarded relief (see Gov't Br. 7, 10) may not in fact have relied on Goldfarb and therefore do not have the reliance interest that appellee urges as the basis for finding the exception to be unconstitutionally underinclusive.

¹⁰An extension of benefits to remedy unconstitutional underinclusiveness, as in *Goldfarb*, is a "task [that] is essentially legislative," in which the court acts as a "short-term surrogate for the legislature." Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 Clev. St. L. Rev. 301, 317 (1979); see also id. at

would affect the newly-recognized claims of nondependent men to unreduced benefits. 11 For these reasons, it was not improper for Congress to confine the exception clause to pre-Goldfarb reliance interests that it considered most worthy of protection and to exclude whatever limited reliance there might have been in the brief period between Goldfarb and the offset. And there can be no doubt that the exception is precisely suited to the protection of those pre-Goldfarb reliance interests (see Gov't Br. 38-40). 12

^{321, 324.} Thus, a court's belief as to what the legislature would have intended is necessarily subject to the overriding authority of the legislature to say what it in fact intended.

IIImmediately following Goldfarb, proposals were made to ameliorate the financial consequences of that decision. Congressional hearings on various alternatives were held in May, June, and July of 1977, including the alternative of eliminating the dual pension and spousal benefits that resulted from Goldfarb. See Gov't Br. 19-20, 40. The Senate bill that contained the offset provision (see Gov't Br. 19 n.9) was reported out of committee on November 1, 1977 (S. Rep. 95-572, 95th Cong., 1st Sess.), and was passed by the Senate on November 4, 1977 (123 Cong. Rec. 37200). The offset was signed into law as part of the Social Security Amendments on December 20, 1977 (Pub. L. No. 95-216, § 334, 91 Stat. 1544). This prompt development of the offset in the wake of Goldfarb qualifies the substantiality of any reliance interest that appellee and his class members may claim during the brief interim between the Goldfarb decision and enactment of the offset provision. See Hospital Association of New York State, Inc. v. Toia, 577 F.2d 790, 797-798 (2d Cir. 1978); cf. FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958).

¹² Furthermore, as discussed in our opening brief (Gov't Br. 39-42 & n.29), the exception clause rests on a "reasoned analysis" (Mississippi University for Women v. Hogan, No. 81-406 (July 1, 1982), slip op. 7) in which Congress considered and rejected alternative approaches that it considered less desirable. See also Congressional Research Service, Library of Congress, Report No. 83-111 EPW, The Government Pension Offset in Social Security 39-46 (Mar. 24, 1981, updated June 17, 1983) (discussion of the policies underlying the exception clause and various alternatives). Indeed, after the five-year transitional period for the exception clause ended in December 1982, Congress twice revisited

In any event, to the extent that Congress was obligated to take into account post-Goldfarb reliance, the exception clause is nonetheless constitutional because it is substantially related to the objective of protecting reliance interests. The exception applies to those people — whether male or female - who were eligible for spousal benefits under pre-Goldfarb law and thus were entitled to plan their retirements in accordance with that law. In addition, in light of the effective date of the statute, nondependent men who submitted a valid application for spousal benefits prior to December 1977 are not subject to the offset, and therefore any reliance by such men on the Goldfarb decision has been accommodated in the statute (see Gov't Br. 4, 27 n.16, 39 n.28). Conversely, divorced wives married more than ten but less than 20 years - the only category of women who were eligible for benefits after 1977 but not before (see p. 4 & n. 2, supra) — do not come within the exception and hence are covered by the offset. And, most importantly-and appellee nowhere disputes the validity of this applicationthe exception does not apply to nondependent men who became eligible for spousal benefits in or after December 1977 and who make no claim that their retirement plans were based on the change in law caused by Goldfarb. Accordingly, it can be seen that there are men and women on both sides of the offset line and that the distinguishing characteristic is the reliance interest of each group.

Against this background, appellee's argument that the exception clause is impermissibly underinclusive must fail. His argument rests on the exclusion from the exception of the particular category of nondependent men who allege

the Act and adopted gender-neutral provisions in place of the original exception. See Gov't Br. 5 n.4; compare Appellee Br. 35 n.26. Thus, once the exception had adequately served to protect the reliance interests formed under pre-Goldfarb law, Congress no longer found it necessary to use a gender-based standard.

that they relied on Goldfarb in making their retirement plans between March-December 1977 and who did not submit a valid application for spousal benefits prior to the December 1977 effective date of the offset provision. Even accepting appellee's argument that this category should have been included in the exception, its omission falls far short of showing that the statute has "no substantial relation" (Lehr v. Robertson, slip op. 18) to the desired objective. A legislative classification, even one involving gender, need not attain a standard of perfection in order to be upheld. The line drawn by the exception clause is not unconstitutional gender discrimination.¹³

Moreover, the new-found and short-lived interest under Goldfarb that is asserted by appellee is plainly less deserving of protection than that of the groups that are exempt from the offset. Clearly appellee's claim to an exception is less substantial than the longstanding interest of those who were entitled to rely on the provisions of the Social Security Act in effect prior to Goldfarb. Similarly, appellee's claim is less significant than that of people who were already receiving spousal benefits by December 1977 or at least had submitted a valid claim for such benefits. Finally, in contrast to the objective criteria now embodied in the offset and exception provisions, appellee's claim is defined in terms of subjective reliance on Goldfarb, a standard that would be quite difficult for the government to apply in practice and largely self-determining by those seeking to invoke the exception clause. In light of these considerations, the exception clause is not unconstitutionally underinclusive.

¹³Cf., e.g., United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 179 (1980); Vance v. Bradley, 440 U.S. 93 (1979); Califano v. Aznavorian, 439 U.S. 170, 174-175, 178 (1978); Califano v. Jobst, 434 U.S. 47 (1977); Califano v. Webster, 430 U.S. 313, 321 (1977); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Mathews v. Diaz, 426 U.S. 67, 82-84 (1976); Weinberger v. Salfi, 422 U.S. 749, 769-770 (1975).

3. The severability clause in the exception provision states that, if the exception is held invalid in any respect, the offset shall remain in effect and the exception shall be considered invalid in its entirety (see Gov't Br. 43-44). The purpose of this severability clause, as its language and legislative history demonstrate, was to ensure that the exception would be nullified rather than extended in the event a court found it to be invalid as written (see id. at 44-45).

Appellee challenges the severability clause on the ground that it "unconstitutionally obstructs the exercise of judicial review" (Br. In particular, he asserts that it "purports to preclude members of appellees' class from receiving any relief from the unconstitutional injury inflicted on them by the exception clause" and that it "purports to curtail the jurisdiction of the federal courts to review the constitutional claim of appellees' class by withdrawing the class' standing to sue" (id. at 43).

Appellee fundamentally misconceives the purpose and effect of the severability clause. 14 As discussed in our opening brief (Gov't Br. 46-50), the severability clause does not prevent the entry of relief in appellee's favor or render an adjudication of his rights a "'gratuitous * * * exercise of

¹⁴Without citation to the legislative history, appellee asserts that Congress must have been "aware that the effect of the clause would be to stifle incentive to challenge the gender-based dependency test enacted in the exception clause" and must have "know[n] that this disincentive would work to assure that the harsh remedial choice envisioned by the severability clause would never have to be invoked" (Appellee Br. 55). Appellee therefore asserts that the severability clause is "a legislative bluff" "that should be "called" by this Court (lbid.). We are aware of no support for appellee's assertions, and this Court has recently noted that even in a First Amendment context it is "reluctan[t] to attribute unconstitutional motives to the [legislature], particularly when a plausible " " purpose for the [legislative] program may be discerned from the face of the statute." Mueller v. Allen, No. 82-195 (June 29, 1983), slip op. 6.

judicial power' "(Appellee Br. 50, quoting Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976)); nor does it restrict the jurisdiction of the federal courts or foreclose judicial review by depriving appellee of standing. Congress has simply provided a substantive rule of law to govern the disposition of litigation like that brought by appellee. See Dames & Moore v. Regan, 453 U.S. 654, 684-685 (1981). Appellee's attack on the severability clause hinges on his failure to appreciate that his constitutional right is to be free from impermissible gender discrimination, not to receive dual benefits under the government pension and Social Security systems. By obtaining judicial relief invalidating the gender-based exception clause, appellee has fully vindicated his right to equal protection. 15

The crux of appellee's argument is his insistence that extension rather than nullification of benefits is the constitutionally required remedy in equal protection cases. This Court's decisions are expressly to the contrary. "'Where a statute is defective because of underinclusion * * * there

¹⁵ Appellee contends that, "by virtue of the article III powers of the federal courts and by the very nature of the constitutional right itself," he is "entitled to an adequate remedy " " - meaning financial compensation - for the "tangible harm * * * [of] the loss of social security spousal benefits" (Appellee Br. 47, 53). Beyond the fact that appellee's substantive right is to equal treatment and not to dual benefits, we are aware of no support for the extraordinary claim that monetary relief must follow from every legal wrong. See, e.g., Nixon v. Fitzgerald, 457 U.S.731 (1982) (absolute immunity). On the contrary, as we discussed in our opening brief, the doctrine of sovereign immunity (Gov't Br. 48-49) and the principle that equal protection violations can be cured by the nullification rather than the extension of benefits (id. at 49-50) illustrate that no such requirement exists. Appellee's confusion is demonstrated by his heavy reliance on Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and its progeny, which were not suits against the federal government and which therefore raised no issue of sovereign immunity.

exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to those who are aggrieved by the exclusion." Califano v. Westcott, 443 U.S. 76, 89 (1979), quoting Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the result). Thus, "filn every equal protection attack upon a statute challenged as underinclusive, the State may satisfy the Constitution's commands either by extending benefits to the previously disfavored class or by denying benefits to both parties." Orr. v. Orr. 440 U.S. 268, 272 (1979). See also Craig v. Boren, 429 U.S. 190, 210 n.24 (1976). Contrary to appellee's contention, the alternative of nullification does not deprive a plaintiff of standing or raise any other Article III issues. See Orr v. Orr. 440 U.S. at 273; Stanton v. Stanton, 421 U.S. 7, 17 (1975); Gov't Br. 47-50.

Nor is a different conclusion compelled because the severability clause indicates Congress's intention that the exception, if invalid as drafted, should be nullified in its entirety rather than "broadened to include persons or circumstances that are not included within it." H.R. Conf. Rep. 95-837, at 72; S. Conf. Rep. 95-612, at 72; see Gov't Br. 44-45. Severability turns on "the intent of the lawmakers • • • [It] presents a question of statutory construction and of legislative intent." Carter v. Carter Coal Co., 298 U.S. 238, 312, 313 (1936). Here Congress has simply "defined its intent as to separability" (Electric Bond & Share Co. v. SEC, 303 U.S. 419, 434 (1938)) and made clear that the exception clause should be eliminated altogether if it cannot be limited to those who Congress believed to be most deserving of its protections. It is peculiar, to say the least, to suggest that because Congress removed any "hesitation or doubt" about its intent (Hill v. Wallace, 259 U.S. 44, 71 (1922)) - which might otherwise have been difficult to

determine in light of Congress's opposing objectives to protect the reliance interests of retirees and to avoid a financial burden on the Social Security trust fund — the severability clause violates notions of separation of powers.¹⁶

A severability clause "does not give the court power to amend the [statute]" (Hill v. Wallace, 259 U.S. at 71) or "to give the statute 'an effect altogether different from that sought by the measure viewed as a whole' " (Carter v. Carter Coal Co., 298 U.S. at 313; citation omitted). See also id. at 316; Sloan v. Lemon, 413 U.S. 825, 834 (1973); Califano v. Westcott, 443 U.S. at 94 (Powell, J., concurring in part and dissenting in part); Welsh v. United States, 398 U.S. at 365-366 & n. 18 (Harlan, J., concurring in the result). By extending the exception clause without regard to dependency or reliance interests, the district court has restructured the Social Security Act in a way that Congress clearly foreclosed. In so doing, it breached " 'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.' "Schweiker v. Hansen, 450 U.S. 785,

¹⁶ Appellee acknowledges (Br. 53) that, if the district court's judgment is upheld in this case. Congress could "abolish the exception clause entirely * * * [by] a prospective repeal." But the severability clause itself was designed to indicate Congress's intent to have an offset provision without an exception clause in the event the exception it enacted is held to be invalid. Thus, appellee's challenge to the severability clause comes down to the proposition that, as a matter of constitutional imperative, the Social Security trust fund must bear the financial burden of unreduced spousal benefits until Congress affirmatively acts to repeal the exception. Contrary to this contention, nothing in the Constitution requires such a drain on the limited funds available for Social Security payments. It surely is not improper for Congress to seek to limit benefits to a particular group without exposing the public treasury to great liability if it turns out that the chosen classification is invalid; yet, under appellee's view, Congress has no means available to effectuate this reasonable objective.

788 (1981), quoting Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947). If the exception clause is held to be unconstitutional, it should be invalidated in its entirety, as Congress intended, rather than extended to appellee and the class he represents.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

REX E. LEE
Solicitor General

NOVEMBER 1983

IN THE

AUG 80 1983

Supreme Court of the United States CLERK

OCTOBER TERM, 1982

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

ROBERT H. MATHEWS, ET AL.,

-v.-

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NATIONAL WOMEN'S LAW CENTER, OLDER WOMEN'S LEAGUE, PENSION RIGHTS CENTER, WOMEN'S EQUITY ACTION LEAGUE, WOMEN'S LEGAL DEFENSE FUND AS AMICI CURIAE IN SUPPORT OF APPELLEES

ISABELLE KATZ PINZLER
Counsel of Record
BURT NEUBORNE
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Of Counsel:

Attorneys for Amici Curiae

NANCY DUFF CAMPBELL National Women's Law Center 1751 N Street, N.W. Washington, D.C. 20036 (202) 872-0670

TABLE OF CONTENTS

	4	Page
TABI	LE OF AUTHORITIES	iii
INTE	EREST OF AMICI	1
STAT	TEMENT OF THE CASE	3
SUMM	MARY OF ARGUMENT	4
ARGU	JMENT	9
	Introductory Statement	9
I.	CONGRESS' ATTEMPT TO RE-ENACT THE SCHEME WHICH THIS COURT HAD EXPLICITLY INVALIDATED VIOLATES THE FIFTH AMENDMENT	16
	A. The Classification at Issue Here Must be Subjected to Heightened Scrutiny	
	B. The Sex-Based Class- ification at Issue is Not Closely and Substantially Related to an Important Govern- mental Interest	
	 The Sex Based Class- ification at Issue is Freighted With the Baggage of Sexual Stereotypes and Dim- inishes the Value of Women's Work 	5

	· ugo
	2. No Legitimate Sex-
	Neutral Governmental
	Interest is Served by
	the Classification,
	and Any Interest That
	is Served is Not Suf-
	ficiently Narrowly
	Tailored
II.	CONGRESS' ATTEMPT TO INSULATE
	AN UNCONSTITUTIONAL DISCRIM-
	INATION FROM JUDICIAL REVIEW
	IS VIOLATIVE OF THE SEPARA-
	TION OF POWERS41
CONC	LUSION59

TABLE OF AUTHORITIES

Cases:	Page
Battaglia v. General Motors, 169 F.2d 254 (2d Cir. 1948)	.54-55
Bradwell v. Illinois, 83 U.S. (16 Wall) 130 (1873)	22
Buckley v. Valeo, 424 U.S. 1 (1976)	41, 45
Califano v. Goldfarb, 430 U.S. 199 (1977)	passim
Califano v. Jablon, 430 U.S. 924 (1977)	11
Califano v. Silbowitz, 430 U.S. 924 (1977)	11
Califano v. Webster, 430 U.S. 313 (1977)	24
Califano v. Westcott, 443 U.S. 76 (1979)	43
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)	29
Craig v. Boren, 429 U.S. 190 (1976)	19, 20
Ex parte McCardle, 74 U.S. (7 Wall) 506 (1869)	47, 49
Goesaert v. Cleary, 335 U.S. 464 (1948)	22
Groppi v. Leslie, 404 U.S. 496 (1972)	46

																														I	a	ge
Guini 43	n '	(1	9	U:	n:	it).	te	ed .		s ·	t.	a	t.	е.	s •			2	3	8		U.		5						• •		23
Heck:		5	1	1	U	. 5	5 .	I		W			4	5	6	1	_	(M	a	v		1	6								40
Immie Ser	gra	ic 5	i e 1 8	3	n v U)		ar.	h L	a	N d W	a h ·	ta.	4	9.	a 0	7	i	2	a U J	t · u	i S n	o . e .	n		4	4	,		4	6		49
John:	so:	n 3	v 6	i	1	Re (:	ok 19	i 7	8	s)		n •			4	1	5					•	•	•		•						48
Kahn	v		S	h	e	v	Lr	1,		4	1	6		U		S			3	5	1		(1	9	7	4)				25
Kirch (1	hbe	er 1)	g		v .		F	e.	е.	n •	s ·	t.	r ·	a	, .		4	5	0		U •		s ·			4	5	5				20
Lane	v		W	i	1:	50	or	1,		3	0	7		U		S			2	6	8		(1	9	3	9)				23
Leary	969	9)		U:	n:	it	: 6	d		s ·	t.	a •	t ·	e •	s •			3	9	5		U •		s •			6	•				48
Lemon 19	2	(1	9	K: 7:	3)	rt).		m	a .	n •		(Ι.)			4	1	1		U •					•					29
Luthe 1	er (1)	84	9)	В	01	có.	le	n •			4	8		U •		s ·			(7		H(w •)					46
Marbi	and	ch	v)		1:	37	ad 7	li (s	8	n 0	3)	5		U ·		s ·			(1										47
Micha Sup (19	e per	l ci l)	M O	r		20		Sir	ot.	n , .	•	m 4	5	0 .	c	U ·	u •	n s	t:	y •	4	6	4									26
Miss: v. 33	H	00	ja	n	,					U		S						,		1	0	0		S		C	t.		2	0		21

				Page
			427 U.S.	297
			cce, 395 t	J.S.
v. Mar U.S.	rathon I	L.Ed.20	598 (19) 5.L.W. 32	52)
			ve Service 3 (1968).	48
Orr v. 0	orr, 440	U.S. 2	268 (1979)	passim
			Ryan, 25	3
chuset	tts v. I	eeney,	or of Mass	
Reed v.	Reed,	104 U.S.	71 (197	1) 39
			153 U.S. S	57
			nited Stat	es, 45
			1, 419 U.S	3.
Rights	Organi	zation	dcky Welfa	

	age
Springer v. Phillipine Islands, 277	
U.S. 189 (1928)	45
United States v. Brown, 381 U.S. 437	
(1965)46	, 49
United States v. Klein, 80 U.S. (13	
Wall) 128 (1872)pa	ssim
United States v. Lovett, 328 U.S.	
303 (1946)	46
United States v. Maryland Savings-	
Share Insurance Corp., 400 U.S. 4 (1969)	20
United States v. Nixon, 418 U.S. 683 (1974)	45
	43
United States v. Padelford, 76 U.S. (9 Wall) 531 (1870)	
United States v. Ptasynski, U.S, 51 U.S.L.W. 4674 (June 6, 1983)	
(June 6, 1983)	20
United States Railroad Retirement Board v. Fritz, 449 U.S. 166	
(1980)20	, 22
Warth v. Seldin, 422 U.S. 490 (1975)	51
Weinberger v. Wiesenfeld, 420 U.S.	
636 (1975)10	, 36
Youngstown Sheet & Tube Co. v.	
Sawyer, 343 U.S. 579 (1952)	45

Statutes: Pag	<u>e</u>
Age Discrimination in Employment Act, 29 U.S. 631(b)	0
Employee Retirement Income Security Act (ERISA), 29 U.S.C. 55 1052, 105334, 3	5
Social Security Act: 42 U.S.C. \$ 402(k)(3)11, 3	4
Section 334 of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509, 15.44-47, 42 U.S.C. § 402 (Supp. IV)	9
Pub. L. No. 97-455 (1983)1 Pub. L. No. 98-21 (1983)4	
5 U.S.C. § 83333	4
5 U.S.C. § 8336(a)3	0
Other Materials:	
H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. (1977)27, 2	8
S. Conf. Rep. No. 95-216, 95th Cong., 1st Sess. (1977)2	8
S. Rep. No. 95-572, 95th Cong., 1st Sess. (1977)	2

Library of Congress Congressional
Research Service Report Prepared
for the Subcommittee on Retire-
ment Income and Employment of
the Select Committee on Aging,
House of Representatives, 96th
Cong., 1st Sess., Women and
Retirement Income Programs:
Current Issues of Equity and
Adequacy, (Comm. Pub. No. 96-190)
(1979)
Sager, Forward: Constutional
Limitations on Congress' Authority
to Regulate the Jurisdiction of
the Federal Courts, 95 Harv. L.
Rev. 17 (1981)53

INTEREST OF AMICI

Amici American Civil Liberties Union,
National Women's Law Center, Older Women's
League, Pension Rights Center, Women's
Equity Action League, and Women's Legal
Defense Fund file this brief with the consent of the parties. The letters of consent have been filed with the Clerk of the
Court.

Amici are organizations dedicated to achieving equal justice under law for women and men. They share an abiding conviction that gender based discrimination casts the weight of the government on the side of traditional notions about male/female behavior, shows up artificial barriers to the attainment by women and men of full human potential and retards society's progress toward equal opportunity.

This case presents the question of whether a reenacted facially discrimina-

tory law may now survive equal protection review where the provision again accords employment-derived benefits more generously to male Social Security covered workers than to female Social Security covered workers. Amici regard this Court's response to the question as critical to recognition of the equal status and dignity of female wage earners.

This case also presents the question of whether Congress may, without offending basic notions of the separation of powers, attach such Draconian consequences to the challenge of an impermissibly underinclusive statutory scheme as to effectively preclude judicial review. The Court's response to this question could be of critical importance to civil rights and civil liberties in a wide variety of contexts.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as presented in the Brief of Appellees.

SUMMARY OF ARGUMENT

I

In Califano v. Goldfarb, 430 U.S. 199 (1977) this Court held that a provision of the Social Security Act which required automatic payment of spousal benefits to all widows, but which required widowers to prove dependency on their deceased spouses, was unconstitutional sex discrimination. In response, Congress passed a statute governing social security spousal benefits of federal and state government employees, the pension offset provision, which inter alia reenacts for a transitional period precisely the same scheme invalidated in Goldfarb. It requires men but not women to prove dependency on their spouses in order to receive full Social Security spousal benefit.

Because the classification at issue is explicitly gender based, the government has the burden of showing that it is closely and substantially related to an important governmental interest. This is not a statute which may be scrutinized under a rational basis analysis. It does not come within any of the judicially recognized circumstances in which gender based classifications have been upheld. It does not compensate for past discrimination against women. Indeed, it perpetuates discrimination against working women by undervaluing the Social Security benefits they have earned for their spouses and by continuing to treat men as economically more significant than women.

The reenacted scheme, no less than its predecessor, is based upon sex-role stereotypes, and therefore cannot survive heightened scrutiny analysis. The reliance of women on spousal benefits earned by their husbands is conclusively presumed. Similarly situated men, however,

are conclusively presumed not to have relied upon being able to receive spousal benefits earned by their wives.

Under the reenacted law, the reliance interests of the spouses of male Social Security workers are preferred over the reliance interests of similarly situated spouses of female workers where the former relied upon an unconstitutional law and the latter on a decision of this Court. The just and orderly processes of government, upon which all citizens rely, regardless of their sex, includes equally the processes of all branches of government. Reliance on the processes of the legislative branch cannot be preferred over reliance on the judicial process.

The statutory scheme is insufficiently narrowly tailored to survive heightened scrutiny analysis. If legislative action is deemed appropriate to protect legitimate reliance it must not reenact

and perpetuate a discriminatory scheme when non-discriminatory action could more narrowly serve the same interest. Congress could have required both men and women to prove dependency or allowed both men and women to demonstrate actual reliance on receipt of spousal benefits.

II

Recognizing that it had reimposed an unconstitutional scheme in the teeth of a decision by this Court, Congress in violation of the separation of powers, added a provision that required that if the Court held this discriminatory scheme unconstitutional, it would be required to invalidate the exception to the pension offset; both men and women must lose the right to full spousal benefits.

This so-called severability clause has the intent and effect of insulating unconstitutional discrimination from

judicial review and thus is violative of the separation of powers. This Court has always protected each of the coordinate branches of government from encroachment by the other branches. This case poses a new and dangerous challenge to judicial review. Congress has sought to exercise a legislative veto over the judiciary by reenacting an invalidated law coupled with a provision which effectively precludes the exercise of judicial review in three ways. First, it deprives plaintiffs of Article III standing to challenge the law by providing that success on the merits cannot be translated into a tangible benefit. Second, because the Court is required to rescind the entire exception to the pension offset provision, it is, in effect, deprived of jurisdiction to order any other result. Third, Congress has created an enormous disincentive, a virtual penalty, to anyone resorting to the

judicial process to challenge the blatantly unconstitutional eligibility scheme. Thus the severability clause is an unconstitutional intrusion by the legislature into the exercise by this Court of its equity jurisdiction.

ARGUMENT

Introductory Statement

On March 2, 1977, this Court ruled that a provision of the Social Security Act which required automatic payments of spousal benefits to all widows, but which required widowers to prove dependency on their deceased spouses, constituted unlawful sex discrimination. Califano v. Goldfarb, 430 U.S. 199 (1977). The provision invalidated in Goldfarb established, in effect, a conclusive presumption of women's dependency. The twin evils which it perpetuated were (1) a reliance on stereotypical thinking which treated men as economically more

significant than women; and (2) a discriminatory undervaluing of the Social Security retirement benefits earned by women. Shortly after deciding Goldfarb, which involved spousal eligibility for survivorship benefits, this Court summarily affirmed two lower court decisions which had invalidated similar sex-differentiated rules governing spousal eligibility for old-age, as opposed to survivorship

^{1.} See Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Prior to Goldfarb, there was, in effect, an irrebuttable presumption that all widows were dependent on their deceased spouses and a rebuttable presumption that no widower was dependent on his deceased wife.

^{2.} Under pre-Goldfarb law, retirement benefits earned by identically situated men and w men covered by Social Security were not of equal worth. Benefits earned by men included the value of an automatic payment to a surviving widow. Benefits earned by women included payments to a surviving husband only if he could prove dependency.

benefits. Califano v. Silbowitz, 430 U.S.
924 (1977); Califano v. Jablon, 430 U.S.
924 (1977).3

Under the Social Security system,
when both spouses have worked in covered
employment, each worker's spousal benefits are reduced by the amount she or he
receives on her or his own account. Social Security Act, 42 U.S.C. § 402(k)(3).
Since many federal and state government
workers are not covered by Social Security,
they have no direct benefits against which
to reduce spousal benefits. Prior to
Goldfarb, where the government employee

^{3.} Old age benefits for the spouses of workers covered by Social Security were automatically payable to wives pursuant to a conclusive presumption of dependency, while husbands seeking benefits as a result of a spouse's eligibility were required to prove dependency. As with the survivorship benefits at issue in Goldfarb, the old age benefits were distributed pursuant to sex-role stereotyping and in a manner which substantially undervalued the economic worth of a working woman's benefits in comparison with an identically situated working man's.

was a woman married to a man covered by Social Security, spousal benefits were available to her without regard for dependency. Where, however, the government employee was a man married to a woman employee covered by Social Security, he would not have received spousal benefits in the absence of proof of dependency. The net effect of Goldfarb, therefore, was to increase the payments to which he would be entitled since he was now elicible for a spousal benefit on the same basis as similarly situated women, without regard to dependency.

Congress, characterizing such an increase in payments to men as a "wind-

fall," elected to establish a pension offset for state and federal government employee retirement benefits. Under Congress'
plan, spouses of employees who were covered by Social Security would be required
to offset the spousal benefits against their
respective government employees retirement
benefits. 5

offset concept to government retirement benefits returned men to their pre-Goldfarb status by eliminating their ability to enjoy a full Social Security spousal benefit along with their government retirement benefits. However, the "pension offset" adversely affected women who, pre-Goldfarb,

^{4.} Curiously, Congress never viewed similar payments to women, either pre-or post-Goldfarb, as windfalls. Indeed, this case is about Congress' attempt to permit women to continue to receive such payments.

^{5.} Section 334 of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509, 15. 44-47, 42 U.S.C. \$ 402 (Supp. IV).

would have enjoyed both spousal benefits and a government retirement pension. This case arises out of the government's attempt to permit such women, but not identically situated males, to continue this favored status.

In order to permit women (but not men) to enjoy both spousal Social Security benefits and government retirement benefits, Congress exempted government employees eligible for retirement prior to December, 1982 from the pension offset if, prior to Goldfarb, they would have qualified for both spousal benefits and government employee benefits. Since, prior to Goldfarb, women automatically qualified for spousal benefits pursuant to a conclusive presumption of dependency, the effect of Congress' action was to use a grandfather clause to re-impose permanently the unconstitutional scheme condemned in Goldfarb on all individuals who

became eligible for retirement between

December, 1977 and December, 1982. For

these individuals, eligibility for spousal

benefits continued to be sex-differentiated,

with women government employees being

treated in a sex-stereotyped manner as

conclusively presumed to be both depend
ent on their husbands and to have relied

upon an unconstitutional scheme.

In response to Goldfarb, Congress could, of course, have adopted an across the board policy of requiring all spousal Social Security benefits to government retirees to be conditioned on a showing that the spouse was dependent on the covered worker. In fact, for the first six months of 1983, Congress utilized just such an approach. § 7, Pub. L. No. 97-455 (1983). In connection with the administration of such a plan, Congress may well have been entitled to establish sex-neutral rebuttable presumptions to ease the administrative burden. As a means of limiting

spousal Social Security payments to retired government workers, however, Congress chose to reinstate the pre-Goldfarb unconstitutional scheme.

Recognizing that it had re-enacted an unconstitutional scheme in the teeth of a decision of this Court condemning it as violative of the Fifth Amendment, Congress added a clause which provided that if the discriminatory scheme were invalidated, all government employees -- both men and women -- could lose the opportunity to enjoy spousal benefits without pension offset.

I. CONGRESS' ATTEMPT TO RE-ENACT THE SCHEME WHICH THIS COURT HAD EXPLICITLY INVALIDATED VIOLATES THE FIFTH AMENDMENT.

This Court held in Goldfarb that spousal Social Security benefits could not be allocated pursuant to sex-differentiated rules which treated women, but not men, as conclusively dependent on their

spouses. The intent and effect of Congress' action in enacting the statute at issue in this case was to perpetuate against every government employee entitled to Social Security benefits who became eligible for retirement between December, 1977 and December, 1982 the very discrimination which this Court condemned in Goldfarb.

As to that group, Goldfarb simply never happened.

The Solicitor General concedes, as he must, that Goldfarb is the law of the land and that Congress may not subvert this Court's constitutional decisions by re-enacting unconstitutional statutes.

He argues, however, that Congress' action is defensible as a reasonable attempt to provide for a transitional period to assist persons who would be adversely affected by the application of the pension offset concept to government pension benefits but who were too close to retire-

ment to make alternative plans. It may well be that a form of transitional assistance was appropriate for persons whose retirement plans were upset by Congress' extraordinary reaction to Goldfarb. However, there were a variety of non-discriminatory forms such assistance could have taken without re-imposing an unconstitutional scheme on thousands of employees. Reliance upon a course of unconstitutional conduct cannot possibly provide a justification for a conscious continuation of such conduct by the legislature. If, for example, increased Social Security payments had, at some point in our history, been payable only to whites, a decision of this Court invalidating such a practice could not possibly have been validly met with a new statute continuing all such racially discriminatory payments during a "transitional" period. Where ameliorative government

action is appropriate, it must be narrowly tailored, and must not reenact and perpetuate a concededly unconstitutional scheme.

A. The Classification at Issue Here Must be Subjected to Heightened Scrutiny.

The government concedes, as it must, that the exception to the pension offset provision incorporates a facial gender distinction. See, e.g., App. Br. 11, 17. Thus, under Craig v. Boren, 42° U.S. 190 (1976), in order to survive it must be closely and substantially related to the achievement of an important governmental interest, and the proponent of such a facial gender based distinction must bear the burden of showing an "exceedingly persuasive justification for the classi-

Amici agree with appellee, however, that the statute may read to preserve its constitutionality, see Motion to Affirm pp. 7-11.

fication." Mississippi University for Women v. Hogan, U.S. , 100 S.Ct. 3331, quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981). The government's reliance on cases upholding allegedly similar provisions as having only a rational basis, e.g., United States v. Ptasynski, U.S. , 51 U.S.L.W. 4674 (June 6, 1983) ("windfall" profits tax); United States v. Maryland Savings-Share Insurance Corp., 400 U.S. 4 (1969); United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980); and New Orleans v. Dukes, 427 U.S. 297 (1973), is misplaced. None of these cases involved gender based or any other inherently invidious classifications which are entitled to greater than minimal scrutiny. For example, in New Orleans v. Dukes, decided shortly before Craig v. Boren, the Court was careful to note that the minimal scrutiny afforded a city ordinance which

drew a distinction based on length of time in business was justified since the classification neither "trammel[ed] fundamental personal rights [n]or [was] drawn upon inherently suspect distinctions ..." 427 U.S. at 303. By contrast, although sex classifications have not been accorded the same intense scrutiny as race and religion classifications, this Court has recognized that "[c]lassifications based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination[,]" Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979) and has therefore reviewed official resort to explicit gender based criteria skeptically and scrupulously. See Orr v. Orr, 440 U.S. 268 (1979); Mississippi University for Women v. Hogan.

The Solicitor General makes the curious argument that although "[t]he genderbased classification incorporated in the exception clause was a conscious and deliberate enactment by Congress ... " it is "not motivated by sexist animus." (App. Br. p. 42, emphasis added). Such a pronouncement ignores the history of sex discrimination, which is rarely based upon hatred in the sense that race discrimination is. The benign protective purposes of much gender-based discrimination have not mitigated their harmful effects upon women, see, e.g., Bradwell v. Illinois, 83 U.S. (16 Wall) 130 (1873); Goesaert v. Cleary, 335 U.S. 464 (1948), or reduced the appropriate measure of scrutiny, Orr v. Orr.

Similarly, although certain so-called "grandfather" clauses may be acceptable because the lines they draw have a rationa! basis, e.g., New Orleans v. Dukes, United States Railroad Retirement Board v. Fritz, this case involves a "grand-

father" clause in its worst and unacceptable sense, the re-establishment of outlawed inequality. In Guinn v. United States, 238 U.S. 347 (1915) the Court invalidated a "grandfather" clause of Oklahoma's constitution under which all voters were required to be literate except persons descended from persons who were entitled to vote on January 1, 1866 or who had at that time resided in a foreign nation. The Court found that the obvious effect was to impose a literacy test only on former slaves and their descendants. Here too the obvious effect of the challenged legislation is to resurrect a burden to a class, but on the basis of its gender. See also Lane v. Wilson, 307 U.S. 268, 275 (1939) (the Constitution "nullifies sophisticated as well as simpleminded modes of discrimination"). The rational basis standard does not suffice under these circumstances.

- B. The Sex-Based Classification at Issue is Not Closely and Substantially Related to an Important Governmental Interest.
 - The Sex Based Classification at Issue is Freighted With the Baggage of Sexual Stereotypes and Diminishes the Value of Women's Work.

The statute at issue here is not one of the few types of laws which have survived heightened scrutiny. This is not a statute, nor is it claimed to be a statute, which may truly be said to have a compensatory purpose or be based upon an identified need for affirmative action. Unlike the statute challenged in Califano v. Webster, 430 U.S. 313 (1977), Congress in this instance neither had nor relied on statistics (or indeed any real evidence) indicating that women federal and state workers had any need to be compensated for past discrimination in receipt of either Social Security or government

pensions.7

Nor can the sex-based classification at issue here be defended by resort to cases in which this Court has sustained sex classifications on the grounds that men and women were not similarly situated. This is not a case involving the military, such as Schlesinger v. Ballard, 419 U.S. 498 (1975) or Rostker v. Goldberg, 453 U.S. 57 (1981), where differential treatment of men and women was based upon an underlying policy of barring women from

^{7.} That women generally, and elderly women in particular, are relatively poorer than men is beyond dispute, but not particularly relevant here, as neither this legislation nor the Social Security Act generally purports to deal with the problem of need. Alleged reliance "not need is the criteria for inclusion," Califano v. Goldfarb, 430 U.S. at 213. Despite the Solicitor General's citation of Kahn v. Shevin, 416 U.S. 351 (1974), no conscious "legislative decision to favor females in order to compensate for past wrongs" is argued here and there was no showing before Congress that the administrative cost of extending benefits to non-dependent men would exceed the cost of holding hearings on dependency or reliance. Cf. Califano v. Goldfarb, 430 U.S. at 222 (Stevens, J., concurring).

combat positions. Nor is it a situation where a distinction was justified because of a unique physical characteristic of one sex as was the case in Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981) (statutory rape laws directed at men only are constitutional because only women can become pregnant). Here men and women are identically situated except for their treatment under the pension offset exception provision.

In the statute challenged here Congress reinstated the identical eligibility test that was struck down in Goldfarb "as it was in effect and being administered." The semantic, but meaningless, changes in the purported grounds for the sex-based distinction apparent in parts of the legislative history cannot obscure this indisputable fact. The justification recited in the legislative history of the Social Security Amendments of 1977, like the

discrimination against men in Goldfarb which was the "accidental by-product of a traditional way of thinking about females", 430 U.S. at 223 (Stevens, J., concurring), is based upon "traditional ways of thinking" about both men and women. As such it is not closely and substantially related to an important governmental interest.

First, the statute conclusively presumes that women, because they are women, relied upon the receipt of full spousal benefits even though many of the women of concern to Congress were either expressly not covered by the provision or were those least in need of such protection.

For example, the Conference Report refers to an uncertain and undocumented "large numbers of women, especially widows in their late fifties, who are already draw-

^{3. &}quot;[T]here may be large numbers. . ." H.R.Conf. Rep. No. 95-837, 95th Cong., 1st Sess. (1977) at 72 (emphasis added).

ing pensions, or who would be eligible to drawn them within five years of the enactment of this bill ... people already retired or close to retirement " H.R. Conf. Rep. No. 95-837 at 72 (emphasis added): S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. (1977) at 72 (emphasis added). The conferees focused mechanically upon the emotionally charged image of "widows" who are already retired or very close to it even though the exception applies with equal force to women whose husbands are living and was completely unnecessary for those already retired. Those already retired, both men and women, were protected from the pension

offset provision; it was entirely prospective in effect. Thus, expressions of concern for the "already retired"

^{9.} The offset requirement applies only to spousal benefits payable "on the basis of application filed in or after the month [December, 1977] in which this Act is enacted." Section 334(f) of the Social Security Amendments of 1977, P.L. 95-216, 91 Stat. 1544. Thus both male and female federal and state workers who had already retired and applied for spousal benefits prior to December 1, 1977 would continue to receive unreduced spousal benefits regardless of the newly enacted pension offset.

^{10.} The government's reliance on cases such as Lemon v. Kurtzman (II),411 U.S. 192 (1973) and Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) is inapposite. These cases define the situations in which a judicial decision in a civil matter should not apply retroactively. However, there is no question of the retroactivity of the Goldfarb decision; people already retired at the time of Goldfarb, and those who retired and applied for benefits prior to December, 1977, continued to receive full spousal benefits. The exception to the pension offset, as the pension offset itself, were entirely prospective in application.

were largely window dressing for stereotypical thinking about women. 11 In fact, not all those protected by this legislation were actually close to retirement in 1977 or even necessarily now. In order to be eligible for and entitled to a pension under the federal Civil Service Retirement System, for instance, a person may be as young as 55 years old. See e.g., 5 U.S.C. § 8336(a). Therefore, a woman who turned 55 before December 1, 1982 will be eligible for the unreduced spousal benefit when she retires even if that does not occur for another 20 years. 12

^{11.} The only exception is those couples like the Mathews where the husband had retired but not yet applied for spousal benefits prior to December 1, 1977. In fact, he applied on December 15, five days before the reenactment of the pre-Goldfarb law but 15 days after its effective date.

^{12.} With some few exceptions, e.g., certain law enforcement officers, there is no general mandatory retirement age for federal employees. See Age Discrimination in Employment Act, 29 U.S. \$631(b).

Thus, women in the protected class are conclusively presumed to have relied upon receiving the spousal benefit just as they had been -- and now are again -- conclusively presumed to have been dependent upon their husbands. In contrast, men like Mr. Mathews, who cannot prove dependence, are not even permitted to prove actual reliance on the benefit. They are irrebutably and conclusively presumed not to have relied on receiving the spousal benefit, even where they did so rely.

Because of its underlying stereotyped notions about women, the post-Goldfarb changes in the Social Security scheme provided their greatest benefit to women who may have needed it the least (e.g., career civil servants). These women are entitled to their full spousal benefit and their government pension. The legislative history, however, presents the older

woman who reenters the job market late in life and who might have been:

"[d]ependent upon her husband for most of her life and might have earned little or nothing in the way of retirement income protection in her own right and yet be denied benefits if a dependency test were implemented." S. Rep. No. 95-572, 95th Cong., lst Sess. (1977) p. 28. (emphasis added)

This stated concern ignores the fact that the pension offset provision obviously has no impact on the spousal benefits of any spouse who has nothing in the way of retirement income protection in her or his own right. The offset is dollar for dollar and does not even come into effect unless there is some governmental pension entitlement against which it can be offset. Women government workers who have earned little in the way of pension benefits would, in addition, be only mar-

ginally affected by a pension offset.

Yet these women -- solely because they are women -- are permitted to retain their full spousal benefits and their government pensions, while similarly situated men are not. 13

^{13.} The fact is that, assuming the luxury of a choice, a woman entering or re-entering the job market in federal or state civil service employment has a greater likelihood of earning at least some pension entitlement than a woman entering or re-entering social security covered employment. According to the recent data, in the private sector, approximately 49% of male employees, but only 21% of female employees, are covered by private pensions. Library of Congress Congressional Research Service Report Prepared for the Subcommittee on Retirement Income and Employment of the Select Committee on Aging, House of Representatives, Women and Retirement Income Programs: Current Issues of Equity and Adequacy, (Comm. Pub. No. 96-190, at p. 3.) (1979). Of those retired persons receiving private pensions, male retirees receive pensions about 40% higher than female retirees. Ibid. at 4. Re-entry women are less likely to be eligible for private pensions even where they exist. Under the Employee Retirement Income Security Act (ERISA), private pension rights do not vest until a person has worked a (footnote continued on following page)

Stereotypes about men are also evident in the legislative history of this provision. The requirement of equal laid treatment for men down in Goldfarb is said repeatedly to have resulted in a "windfall" for men. The use of a word like "windfall" is particularly unfortunate since it implies that the recipient has selfishly received unearned gains. Interestingly, it is applied only to men when they become eligible for a benefit based upon the labor of their wives which similarly situated women have long received based upon the labor of their husbands. However it is characterized, it nonetheless

minimum number of years (usually ten) under the plan, see generally 29 U.S.C. §\$1052,1053, whereas under the federal system a worker can be eligible for a pension after only five years. 5 U.S.C. \$8333. Furthermore, such a woman would, of course, have to choose between her own Social Security benefit and her spousal benefit; she cannot receive the full amount of both. 42 U.S.C. \$402(k) (3).

is the same benefit for women as for men.

Both men and women expected these benefits

would be available in accord with the decisions of this Court.

As in Califano v. Goldfarb and Weinberger v. Weisenfeld, this statutory scheme discriminates against one particular category of family -- one in which the female spouse is a wage earner covered by Social Security. Because of the reenactment of pre-Goldfarb standards for eligibility, the labor of women like Mary Mathews in Social Security covered employment is demeaned and undervalued in comparison with the labor of similarly situated men. Similarly situated men can deliver the full spousal benefit to their family units (including themselves) or their surviving widows, but women

cannot. 14 Here, as in Weinberger v. Weisen-feld, the statutory provision imposes "a gender based distinction which diminishes the protection afford to women who do work." 420 U.S. at 648. As such, it is not substantially related to an important government interest.

 No Legitimate Sex-Neutral Governmental Interest is Served by the Classification, and Any Interest That is Served is Not Sufficiently Narrowly Tailored.

The government identifies its interests in the sex-based exception to the pension offset provision as the furthering of the financial security of individual re-

^{14.} Indeed, Mary Mathews suffers a double discrimination. Her years of private employment do not yield the benefits received by men who worked in government employment and her own standard of living is reduced directly as a result of her husband's ineligibility for spousal benefits.

tirees and their families 15 and the collective interest of "ensuring citizens have confidence in the just and orderly processes of government." (App. Br. at 34). But, as discussed above, the government cannot so easily justify its purported furthering of the financial security of one group of individuals and their families over that of another group of individuals and their families, solely on the basis of sex.

Why is the asserted reliance of female workers on the right to the spousal benefit any more "legitimate" (App. Br. 33) than the same reliance of the male workers? There is no showing or reason to believe that more members of either group had relied to any greater extent than members of the other group. Cer-

^{15.} The stated concern for financial security of retirees and their familes however, is, belied by the requirement of the severability clause that all spousal benefits be offset if the exception clause is invalidated.

tainly both men and women had an expectation of receiving benefits. To say that the women government workers may not be the most needy as a group (supra, pp. 31-34) is not to denigrate the importance of their expectation of a certain retirement income. The failure, however, to include the same concerns of male workers renders the exception impermissibly underinclusive. Congress' preference for the women's expectation interest in the face of the Court's decision to the contrary cannot be justified. To say that men had an expectation of spousal benefits "only as a result of the Goldfarb decision" (App. Br. at 38) (emphasis added) is to denigrate this Court and the judicial process. Surely the "just and orderly processes of government" on which all citizens rely must include both the process of the judiciary and of the legislature to the same degree.

Even if a legitmate sex-neutral governmental interest could be identified here, the congressional response is not sufficiently narrowly tailored. In order to be closely and substantially related to such a governmental interest, the legislation would have to have been, as it could have been, far more carefully and narrowly drawn. Congress could have instituted a dependency test, as used for the first six months of 1983 (Pub. L. No. 97-455). It could have instituted a test for actual reliance. 16 Administrative inconvenience is an insufficient ground for refusal to engage in individualized findings where sex is used as a proxy for some other factor. See, e.g., Reed v. Reed, 404 U.S. 71 (1971); Orr v. Orr. As noted

^{16.} Mary and Robert Mathews could have satisfied such test since they retired prior to December 1977 actually believing they would receive the spousal benefit.

by this Court in Heckler v. Campbell, U.S. , 51 U.S.L.W. 4561 (May 16, 1983), the "Social Security hearing system is 'probably the largest adjudicative agency in the western world'" (citation omitted), requiring more than a quarter of a million hearings a year. Id. at 4562 n.6. It is thus presumably well equipped to hold the necessary hearings on reliance or dependency. Alternatively, Congress could have phased in the pension offset for both men and women on an equal basis or it might have utlized a partial pension offset, as it ultimately did for all persons eligible to retire after June 30, 1983 (Pub. L. No. 98-21). Congress chose to do none of these but instead simply reenacted an unconstitutional law. Neither

its "transitional" trappings 17 nor the new, but suspiciously familiar reasons can save this unconstitutional act.

II. CONGRESS' ATTEMPT TO INSULATE
AN UNCONSTITUTIONAL DISCRIMINATION FROM JUDICIAL REVIEW IS
VIOLATIVE OF THE SEPARATION
OF POWERS.

Assuming that this Court reaffirms

Goldfarb and finds that the exception

clause of the pension offset provision

is unconstitutional, the question then

becomes whether Congress may validly

deny any relief to appellees for the con-

^{17.} The five year delay by Congress in effectuating equal benefits cannot be compared to the judicial stays cited by the government. In Northern Pipeline Construction Co. v. Marathon Pipeline Co., ___ U.S. ___, 73 L.Ed.2d 598 (1982) the Court stayed its own judgment for three months. The stay was ultimately extended for an additional three months, allowing a total stay of approximately six months. 51 U.S.L.W. 3259 (Oct. 4, 1982). In Buckley v. Valeo, 424 U.S. 1 (1976) the Court stayed its judgment for thirty days. Furthermore, those who qualify for the exception to the offset will receive full benefits, not for a transitional period, but permanently, for their entire lifetimes.

stitutional wrong they have suffered. Congress directed that if its attempts to provide discriminatory treatment for certain spouses were successfully challenged, all Social Security spousal benefits -to both men and women -- were to be subject to the pension offset. Defended as a mere "severability clause" by the Solicitor General, the clause, in fact, has the intent and effect of insulating an unconstitutional discrimination from judicial review by destroying Article III standing to attack it, by removing the power from the Court to remedy it, and by penalizing persons for seeking to prevent its implementation. In effect, Congress has provided that if A challenges a statute which unconstitutionally provides a benefit to B but not to A, then both A or B must lose benefits. While the remedial issues surrounding a challenge to an underinclusive statute are difficult,

see, e.g., Califano v. Westcott, 443 U.S.
76 (1979), one clearly inappropriate response is for Congress to mandate that this
Court must automatically nullify the entire
program.

The role of judicial review in the separation of powers could not survive if Congress were permitted to attach automatic Draconian consequences to the successful exercise of judicial review. If, for example, Congress deprived welfare recipients of the vote, it could hardly provide that the result of a successful judicial challenge to the statute would be the immediate termination of all welfare payments. Similarly, Congress cannot seek to deter judicial review of underinclusive statutes by threatening Draconian consequences should the previously worded congressional statute again be deemed unconstitutionally discriminatory.

It is, of course, a truism to note that separation of powers is the fundamental organizing principle of our system of government. As this Court recently observed, adherence to the structural restraints imposed by separation of powers remains a crucial bulwark of freedom.

Immigration and Naturalization Service v.

Chadha, ____ U.S. ___, 51 U.S.L.W. 4907

(June 23, 1983).

Our system of separation of powers
divides governmental authority into three
functions: The making of laws, which is
confided to the legislative branch acting
pursuant to procedures spelled out in
Article I of the Constitution; the administration of laws, which is confided to
the executive branch acting pursuant to
authority conferred by Article II; and the
resolution of disputes concerning the
meaning and constitutionality of laws,
which is confided to the judiciary by

Article III of the Constitution. While the functions are hardly watertight and while the Constitution pre-supposes a degree of inter-branch cooperation, this Court has recognized that an attempt by one branch to inhibit the performance of functions which are confided to another by the Constitution is violative of separation of powers, and is, therefore, void.

Just as it has protected Congress from encroachment by the executive, e.g., Youngstown Sheet & Tube Co. v. Sawyer,

343 U.S. 579 (1952); Schechter Poultry v.

United States, 295 U.S. 495 (1935); and

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), the judiciary from encroachment by the executive, United States v. Nixon,

418 U.S. 683 (1974), the executive from encroachment by Congress, e.g., Buckley v. Valeo, 424 U.S. at 120-143, Springer

v. Phillipine Islands, 277 U.S. 189 (1928), and Immigration and Naturalization Service v. Chadha, and Congress from the encroachment by the judiciary, e.g., Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (the political question doctrine generally) and Rostker v. Goldberg, this Court has scrupulously protected the judicial function from legislative encroachment. For example, in United States v. Brown, 381 U.S. 437 (1965) and United States v. Lovett, 328 U.S. 303 (1946), the Court declined to permit Congress to impose legislative punishment on individuals, noting that the function was vested in the judiciary. See also Groppi v. Leslie, 404 U.S. 496 (1972). In Northern Pipeline Construction Co. v. Marathon Pipeline Co., this Court invalidated portions of the Bankruptcy Act which sought to confer Article III powers upon Article I judges.

Most significantly, in <u>United States</u> v.

<u>Klein</u>, 80 U.S. (13 Wall) 128 (1872)

this Court refused to permit "Congress to dictate the evidentiary value of a

Presidential pardon, noting that Congress has inadvertently passed the limit which separates the legislative from the judicial power." <u>Id</u>. at 147.

Since Marbury v. Madison, 5 U.S.

(1 Cranch) 137 (1803), it has been clear that one of the critical functions assigned to the Article III judiciary is to "say what the law is" in disputes which call into question the constitutionality of legislative or executive conduct. Despite occasional ill-considered threats, rarely has Congress or the President sought to prevent an Article III court from carrying out its constitutional responsibilities. Compare United States v. Klein with Ex parte McCardle, 74 U.S.

(7 Wall) 506 (1869). Indeed, in those settings in which interference may be said to have occurred, the Court has firmly rebuffed it.

In United States v. Klein, Congress enacted a statute which purported to fix the meaning which a court could give to a Presidential pardon in a case pending before it. The Court, recognizing the statute as an interference with the judicial function, promptly invalidated it. Similarly, the Court has declined to give effect to legislative presumptions which force courts to make findings of fact on insufficient evidence. 18 and has refused to construe congressional statutes to preclude judicial review. E.g., Johnson v. Robinson, 415 U.S. 361, 366, n.8 (1974); Oestereich v. Selective Service System, 393 U.S. 233, 240, 243 (1968)

^{18.} See generally Leary v. United States, 395 U.S. 6 (1969).

(Harlan, J., concurring).

This case poses a new and dangerous challenge to judicial review. Instead of openly usurping the judicial function as in Brown or Lovett, or assigning it to an Article I official as in Marathon Pipeline, or explicitly removing jurisdiction as in Klein or Ex parte McCardle, Congress has sought to exercise a legislative veto over the judiciary by preventing the exercise of judicial review by (1) removing standing from any challenger; (2) by in effect, removing from the courts, jurisdiction to give any remedy other than recision of all spousal benefits; and (3) imposing a punishment as the price for obtaining judicial review. However, just as a legislative veto over the executive was invalid in Chadha, so the legislative veto over the judiciary is invalid in this case. By providing that if the judiciary carries out its duty to condemn

the sex discrimination inherent in this statute, the entire exception terminates, Congress has sought to insulate its statute from judicial review and, thus, has violated the principle of separation of powers.

Congress' attempted legislative veto of judicial review operates in the following ways. First, it deprives plaintiffs of Article III standing to challenge the statute by providing that success on the merits cannot be translated into a tangible benefit. As the Court noted in Simon v. Eastern Kentucky Welfare Rights Organization (EKWRO), 426 U.S. 26 (1976), Article III requires that a judicial decision be capable of resolving the case or controversy which triggered it. In EKWRO this Court ruled that a District Court lacked Article III power to pass on the legality of granting tax benefits to hospitals which failed to serve the poor

because no assurance existed that, even in the absence of such benefits, hospital care for the poor would improve. 19 See also Warth v. Seldin, 422 U.S. 490 (1975). Indeed, in Orr v. Orr, this Court noted that it was the possibility of a favorable legislative response which provided standing in many under-inclusiveness challenges. Here, of course, Congress has precluded a favorable legislative response by providing for the automatic termination of the exception. 20 Similarly,

^{19.} In the view of <u>amici EKWRO</u> was wrongly decided because it is reasonable to assume that hospitals could and probably would have changed their practices in order to retain tax exemptions.

^{20.} Nor is the lame suggestion of the Solicitor General that standing may be bestowed by the hope that this Court would invalidate the automatic cut off provision persuasive. While such a hope might provide standing for an initial challenge to such a statute, were its validity upheld by this Court, no future litigant could harbor a reasonable hope of invalidating it.

in this case, given the automatic loss of benefits imposed by Congress as the price of judicial review, any plaintiff may well, under EKWRO, lack Article III power to challenge the obviously discriminatory aspects of the statute because no possibility exists of alleviating plaintiff's injury in fact. In effect, therefore, Congress has re-enacted an unconstitutional statute and simultaneously sought to insulate it from judicial review in flat violation of basic principles of separation of powers.

Second, the result imposed by Congress on the judiciary in the event of a successful challenge to the gender discrimination is, in effect, a selective deprivation of the Court's jurisdiction; it purports to remove the ability of the Court to exercise its full remedial power over the controversy. Congress cannot undo the Supreme Court's constitutional

doctrine by simple legislative fiat, and it should not be able to accomplish the same end by manipulating the courts' jurisdiction. 21 In United States v. Padelford, 76 U.S. (9 Wall) 531 (1870), the Court ruled that a presidential pardon allowed its recipients, supporters of the Confederacy in the Civil War, to recover confiscated property. Congress reacted to Padelford by passing legislation which both (1) declared that a pardon could not cure disloyalty, that acceptance of such a pardon was in fact conclusive proof of disloyalty, and (2) ordered the Court of Claims and the Supreme Court to dismiss all pending claims by pardonees for confiscated property for lack of jurisdiction. The Court in United States v. Klein

^{21.} Sager, Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 68 (1981).

invalidated this attempt by Congress to impose upon the judiciary a rule of decision which limited its power to effectuate its decisions. The Court there noted:

"The language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have." 80 U.S. (13 Wall.) at 145.

Regardless of whether Congress intended to deprive the Court of full jurisdiction to adjudicate constitutional rights it cannot promulgate legislation which has that precise effect. Jurisdictional limitations cannot survive if substantive provisions of legislation are unconstitutional, Battaglia ". General

Motors, 169 F.2d 254,257 (2d Cir. 1948). The legislation at issue here abrogates judicially recognized rights and, in effect, simultaneously deprives its victims of a judiciary empowered to remedy their claims fully and independently.

Finally, by penalizing persons who are dependent on the program in question by terminating the exception if the discrimination is prohibited, Congress has created an enormous practical disincentive to judicial review of its blatantly unconstitutional action. This Court has already held that access to the judicial process may not trigger the imposition of a punishment. For example, persons who have succeeded in setting aside a criminal conviction may not,

ordinarily, receive a harsher sentence on a re-conviction in the absence of a clear justification. North Carolina v. Pearce, 395 U.S. 711 (1969). The automatic invalidation clause penalizes the exercise of the right to seek judicial review in a subtle but very compelling way. Most people would shrink from depriving their fellow citizens of a benefit if they could have no possibility whatever of thereby gaining any tangible advantage for themselves. It is more than an exercise in futility; it threatens to work a positive deprivation upon others who have never harmed the would-be plaintiff. A challenger to such a scheme may realistically expect to receive the opprobrium of those who will suffer as a result of the exercise of his ultimately symbolic rights. Any

statute which provides that the price of judicial review is the automatic unreviewable termination of both the valid and invalid aspects of the program cannot be tolerated.

Of course, recognizing that Congress cannot impose a legislative veto over judicial review is not the equivalent of arguing that benefits in an underinclusiveness case must or may always be equalized at the higher level. While courts or legislatures may equalize they need not necessarily do so. Several remedial options are open in an underinclusive setting: equalizing, if necessitated by constitutional principles and if economically feasible; recal-

culation of benefits to spread the original economic package over the enlarged class of beneficiaries; and remand to the legislature for a decision on the structure of the program in light of constitutional prohibition on existing discrimination. Pursuant to this Court's decision, Congress would, of course, have broad discretion to restructure the program, subject to two overriding limitations -- the gender discrimination may not be reinstated and the beneficiaries may not be penalized for having subjected Congressional discrimination to judicial review.

CONCLUSION

For the foregoing reasons the decision of the district court should be affirmed.

Respectfully submitted,

ISABELLE KATZ PINZLER

Counsel of Record

BURT NEUBORNE

American Civil Liberties

Union Foundation

132 West 43rd Street

New York, New York 10036

(212) 944-9800

Attorneys for Amici Curiae

Of Counsel:

NANCY DUFF CAMPBELL National Women's Law Center 1751 N Street, N.W. Washington, D.C. 20036 (202) 872-0670

August 30, 1983

Office-Supreme Court, US FILED JUN 16 1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET HECKLER.

V.

Appellant

ROBERT H. MATHEWS, ET AL.,

Appellee

On Appeal from the United States District Court for the Northern District of Alabama

BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AND JAMES L. OBERSTAR, MEMBER OF CONGRESS, AS AMICI CURIAE

> EDITH U. FIERST (Counsel of Record) Suite 712 1140 Connecticut Ave., N.W. Washington, D.C. 20036 (202) 223-3420

JOSEPH F. HENDERSON Staff Counsel American Federation of Government Employees. AFL-CIO 1325 Massachusetts Ave., N.W. Washington, D.C. 20005 (202) 737-8700

JAMES R. ROSA General Counsel American Federation of Government Employees, AFL-CIO

1325 Massachusetts Ave., N.W. Washington, D.C. 20005 (202) 737-8700

June 1983

QUESTION PRESENTED

Whether a statutory exception to a general provision in the Social Security Act that was intended to protect the reliance interests of certain individuals violates the equal protection component of the Due Process Clause of the Fifth Amendment because it incorporates a gender-based classification previously held unconstitutional in a different context.

TABLE OF CONTENTS

		Page
PREL	JMINARY STATEMENT	1
INTE	REST OF AMICI CURIAE	2
STAT	EMENT	2
SUM	MARY OF ARGUMENT	4
ARGU	JMENT	6
I.	Congress specifically acted to delay the effective date of the public pension offset in order to protect justifiable reliance interests of public employees	6
II.	This Court has previously recognized the importance of the reliance interest of those who anticipate receiving benefits	9
III.	This limited scope of the delayed effective date does not offend the Constitution	12
IV.	The delayed effective date established by Congress to protect reliance interests is limited and transitional	14
V.	The delayed effective date serves an important governmental purpose	16
CONC	LUSION	18

TABLE OF AUTHORITIES

Cases:	Page
Califano v. Goldfarb, 430 U.S. 199 (1977)4, 6, 12	. 14. 17
Califano v. Silbowitz, 430 U.S. 924 (1977)	4
Califano v. Webster, 430 U.S. 313 (1977)	17
Chevron Oil v. Huson, 404 U.S. 97 (1971)	17
Craig v. Boren, 429 U.S. 190 (1976)	16
Griffin v. Illinois, 351 U.S. 12 (1956)	
Jablon v. Califano, 430 U.S. 924 (1977)	
Kahn v. Shevin, 416 U.S. 351 (1974)	17
Nachman v. Pension Benefit Guarantee Corpora-	
tion, 446 U.S. 359 (1980)	9-11
Rostker v. Goldberg, 453 U.S. 57 (1981)	17
Schlesinger v. Ballard, 419 U.S. 498 (1975)	, 13-14
166, 197 (1980)	16
Constitution and Statutes:	
United States Constitution, Fifth Amendment	4.12
Employee Retirement Income Security Act of 1974	
(ERISA), 29 U.S.C. § 1056(b) (1976)	
Social Security Act Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509 (codified as amended	
at 42 U.S.C. §§ 302-1397 (Supp. V 1981))	passim
Pub. L, No. 98-21 (1983)	
Pub. L. No. 97-455 (1983)6,	
Congressional Documents:	
Conference Committee Report, Social Security	
Amendments of 1977, H.R. Rep. No. 837, 95th	
Cong., 1st Sess. 72, reprinted in 1977 U.S. Code	
Cong. & Ad. News 4155, 4318, S. Rep. No. 612,	
95th Cong., 1st Sess. 72	11. 13
Miscellaneous:	,
Bassett, State and Local Pensions, in Coming of	
Age; Toward A National Retirement Income	~
Policy, Appendix to Report 81 the National Com-	
mission on Pension Policy (Washington, D.C.	
1981)	8
Kilpatrick, James, Insurance Bills; The Woman	
Pays, Washington Post, May 27, 1983	11

In The Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1050

MARGARET HECKLER,

Appellant

V.

ROBERT H. MATHEWS, ET AL.,

Appellee

On Appeal from the United States District Court for the Northern District of Alabama

BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AND JAMES L. OBERSTAR, MEMBER OF CONGRESS, AS AMICI CURIAE

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 36.2, written consent of the parties having been obtained and filed along with this brief, the American Federation of Government Employees, AFL-CIO (AFGE) and Congressman James L. Oberstar file this brief as amici curiae in support of this appeal by Margaret Heckler, Secretary of Health and Human Services.

INTEREST OF AMICI CURIAE

AFGE is an unincorporated association representing approximately 700,000 civilian employees and retirees of the federal government, including hundreds of members whose entitlement to Social Security spouse benefits is dependent upon this case. AFGE is the largest labor organization of non-postal federal employees including the so-called blue collar, white collar and professional groups of employees located in nearly every major department and agency of the federal government and the government of the District of Columbia.

In its capacity as exclusive bargaining representative, AFGE negotiates personnel policies, presents grievances and complaints, including court actions, and carries on legislative activity to improve the welfare of the employees it represents. AFGE files this brief in support of Public Law 95-216 and joins the United States' contention that the judgment below should be reversed.

James L. Oberstar, a Member of Congress from Minnesota, represents over 500,000 constituents, a significant number of whom have made plans to retire, which it is too late for them to change, in the expectation they would receive both Social Security spouse benefits and public pension. Because Minnesota's public employees are not covered by Social Security as a result of their public employment, an immediate effective date would create a problem for State and local employees in his constituency, as well as for Federal employees.

STATEMENT

Appellee retired from employment with the United States Postal Service on November 18, 1977. His wife had retired from her employment four months earlier and was fully insured under the Social Security Act. 42 U.S.C. § 302 et seq., hereinafter Social Security Act. In December of 1977, Appellee filed an application for husband's insurance benefits based upon his wife's earnings record. In connection with his application for benefits under Section 202(c) of the Social Security Act, 42 U.S.C. § 402(c). Appellee informed the Social Security Administration that as a result of his own employment record he was receiving a civil service pension of \$573.00 per month. On March 23, 1978, the Social Security Administration advised the Appellee that although he was entitled to husband's insurance benefits under Section 202(c), the amount of his monthly benefit would be offset dollar-by-dollar by the amount of his civil service retirement pension, in accordance with the provisions of the 1977 amendments to the Social Security Act contained in Section 334 of Pub. L. No. 95-216, 91 Stat. 1509, 1544-47: 42 U.S.C. § 402 (Supp. IV). Because the amount of his pension exceeded the amount of the monthly benefit, Appellee was notified that he would receive no payments from Social Security.

After complying with requirements to seek an administrative remedy, the Appellee appealed the decision of the Social Security Administration on behalf of himself and all others similarly situated. The District Court for the Northern District of Alabama found section 334(g) (1)(B) of the Social Security Amendments of 1977 (91 Stat. 1509, 1546-47, 42 U.S.C. (Supp. IV) 402) (P.L. 95-216), under which the Appellee deemed was subject to the offset and therefore denied payment of a husband's benefit, to be unconstitutional.

It also found unconstitutional the severance clause in section 334(g)(3) of the Social Security Amendments of 1977 (91 Stat. 1509, 1547). Under that clause, if the coverage of the provision delaying the reduction in Social Security benefits for any person should be found invalid,

the delay would be deemed invalid as to everyone and the reduction in the benefits would be immediate for all.¹

A jurisdictional statement was filed by the Solicitor General of the United States, and this Court agreed to consider the case.

SUMMARY OF ARGUMENT

The delayed effective date of the public pension offset, found in Section 334(g)(1) of P.L. 95-216, is a constitutional act by Congress to protect the reliance interests of public employees facing retirement.

Prior to 1977, the Social Security Act differed in its eligibility standards for husbands and wives. Wives and widows were eligible for spouse benefits whether or not they were dependent on their husbands. Husbands and widowers were eligible for spouse benefits only if they were dependent on their wives at the time of retirement disability or death for half their income (construed to mean they earned less than a quarter of the family income in a two-person household).

This differential was gender-based, and as such, was successfully challenged in several landmark cases. On March 2, 1977 this Court held that the higher eligibility standard for widowers, as compared to widows, was a violation of the Equal Protection Clause of the Due Process provision in the Fifth Amendment. Califano v. Goldfarb, 430 U.S. 199 (1977). Three weeks later, the Court summarily affirmed two district court decisions which had struck down the dependency test for husbands of living wives. Califano v. Silbowitz, 430 U.S. 924 (1977), and Jablon v. Califano, 430 U.S. 924 (1977).

These decisions faced the Congress with a dilemma. If husbands and widowers were to be treated as generously

¹ This Court also has before it the issue of the validity of the severability clause. Amici believe that the severability clause is invalid.

as wives and widows, the cost would be very great, but the only alternative was to reduce benefits for wives and widows to the level applicable to husbands and widowers.

In considering what to do Congress focused specifically on the cost of providing Social Security benefits to non-dependent husbands with substantial entitlement to public pensions. The reason for this particular concern was that while Social Security benefits for husband and wife are integrated with each other, benefits under other public employment systems may be payable without regard to the recipient's entitlement to a spouse benefit from Social Security.

The method by which Social Security integrates benefits for husband and wife is called the "dual entitlement rule." This rule works by reducing the Social Security spouse benefit to which an individual is entitled by the amount of that individual's entitlement from his or her own earnings.

Faced with the alternative of providing spouse benefits for non-dependent husbands at great expense, Congress decided to deny Social Security spouse benefits to wives and widows with their own public pensions by enacting a "public pension offset" modeled on the dual entitlement rule. The new law provided that individuals who were recipients of a public pension based on their own earnings would be eligible for a Social Security spouse benefit only to the extent the spouse benefit exceeded the public pension unless the public employment was covered by Social Security on the last day of the spouse's public employment.² At the same time as it enacted the public pension offset, Congress took steps to protect the reliance interests of persons already retired and those nearing retirement age from an abrupt change in their future benefits.

 $^{^2}$ See § 334 of the Social Security Amendments of 1977, 91 Stat. 1509, 1544-47, amending sections 202(b), (c), (e), (f), (g) of the Social Security Act, 42 U.S.C. §§ 402(b), (c), (e), (f) (1976) respectively.

ARGUMENT

L Congress specifically acted to delay the effective date of the public pension offset in order to protect justifiable reliance interests of public employees.

Section 334(g) (1) of P.L. 95-216, delayed the effective date of the public pension offset and protected both persons already retired and those public employees nearing retirement. These two groups were exempted from the impact of the public pension offset, the former by not being covered by the public pension offset, and the latter by the "delayed effective date." The delayed effective date protected from the offset all future payments to those individuals who became eligible for a public pension before December 1, 1982 if they would have been entitled to a full spouse benefit under the law as it existed in January 1977, a month before the Goldfarb decision was rendered. Those persons could reasonably have made retirement plans in the expectation of receiving both Social Security and a civil pension.

Denying benefits to the elderly creates greater problems than similar reductions in benefits for the young or middle-aged, because it is likely to be too late for them to earn other retirement income to make up for the reduction. If plans for old age have been made in expectation of a specific level of income, lifetime residences may have been sold and new homes purchased, commitments may have been made to retirement houses, and standards of living may have adopted that cannot easily be changed. In these circumstances, it can be devastating to the individual involved to reduce benefits, requiring abandonment of routines and destroying the very security Social Security was designed to provide.

Moreover, many of the persons likely to be adversely affected by the public pension offset had made previous

³ See § 334(g) (1) (A) of the Social Security Amendments of 1977, 91 Stat. 1509, 1546, 42 U.S.C. § 402(g) (1) (A) (Supp. V 1981), as amended by Pub. L. 97-455 and Pub. L. 98-21.

employment decisions which might have been different if the public pension offset had been anticipated. For many it would have made more sense to work in the private sector than in the public sector.

One group for whom this is true are women (frequently widows or divorcees) who went to work for a public employer late in life after years as homemakers, expecting to supplement their social security spouse benefits with a public pension. Under the public pension offset, however, the public pension which they earn may not increase their total retirement income, but instead may substantially or totally replace the Social Security spouse benefit they would otherwise receive. If, alternatively, these women had obtained employment with a private employer covered by Social Security, even if their Social Security had remained constant, they could have earned a private pension. The difference is attributable to the fact that the public pension offset does not distinguish between that portion of a public pension which is a substitute for Social Security and that which is a substitute for a private pension. Both components serve to reduce the employee's entitlement to Social Security, to the substantial disadvantage of some public employees.

Another group are those for whom the tax laws makes the earning of a public pension unwise. In 1977 Social Security was tax-free. The same is not true of the tax treatment of public pensions. Instead, after the retiree has received back his or her own contributions to the pension fund, the public pension is fully taxable. This means that individuals who receive a public pension in lieu of Social Security may experience an after-tax decrease in dollar income. From the perspective of retirement income, therefore, the individual might have been

⁴ Even after the Social Security Amendments of 1983, half of everyone's Social Security will remain tax-free, and the other half will be taxed only in the case of recipients with substantial additional income. Section 121 of Pub. L. No. 98-21 (1983).

wiser to choose private employment or even no employment.

A third group who might have made other employment plans are those affected by the difference in the indexing of the two types of plans. Social Security is indexed to inflation, but many that and local plans are not. If the latter have any indexing feature at all (and some do not), their increases may be capped at three or four percent. For those with entitlement to both Social Security and a State or local pension, as inflation proceeds Social Security entitlement will go up, but there may be no increase in the retiree's overall income until such time as the Social Security spouse benefit exceeds the public pension. During the period before that happens, the offset would keep the dollar amount of the combined pensions flat, and the retiree's real income would erode.

This could not happen if the Social Security were supplemented by a private pension instead of a public pension. Under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1056(b) (1976), private pension plans integrated with Social Security are prohibited from reducing their benefits after the employee retires to balance increases in Social Security. This provision gives the employee the security of knowing that in times of inflation, the Social Security portion of his or her retirement income will keep its real value, and the private pension portion will keep its dollar amount. The private pension can never be reduced as a result of cost of living increases to Social Security.

Thus an individual whose public pension is inadequately indexed might have been better off seeking private employment rather than public employment.

⁶ Bassett, State and Local Pensions, in Coming of Age; Toward A National Retirement Income Policy, Appendix to Report of the National Commission on Pension Policy, 1981, pp. 595-99, Washington, D.C.

Those who relied on the statute might, therefore, have acted differently both in making their employment choices and in planning their retirement if they had been given timely warning of the public pension offset.

A decision by the Court to invalidate the delayed effective date might destroy the future entitlement of those persons who became eligible for a public pension in the years between 1977 and December 1, 1982. They are 6 years older now, and it would be even more difficult for them to make satisfactory arrangements than it was when Congress enacted the delayed effective date.

II. This Court has previously recognized the importance of the reliance interest of those who anticipate receiving benefits.

In the recent case of Nachman v. Pension Benefit Guarantee Corporation, 446 U.S. 359 (1980), this Court dealt with a complex situation involving Title IV of the Employee Retirement Income Security Act of 1974 (ERISA) which guarantees "nonforfeitable" benefits. The plan at issue provided for the vesting of certain benefits but specified that the employer was not liable for funds in excess of the money he had already contributed when the plan terminated. ERISA's vesting requirements had not yet become effective when the plan terminated, so the only basis for deeming the benefits "nonforfeitable" was the plan's provisions. The question was whether the anticipated benefits had vested under the plan, despite the exculpatory clause. If the answer was affirmative, the employer would be responsible under the statute for reimbursing the Pension Benefit Guarantee Corporation for its expenditures in paying guaranteed benefits, up to onethird of the employer's net assets.

This Court held in favor of payment of the anticipated benefits, and in doing so, cited the legislative history of the ERISA. It found that one of Congress' cen-

tral purposes in enacting ERISA had been to prevent the great personal tragedy suffered by employees whose vested benefits are not paid when pension plans are terminated. Id. at 374. It noted that Congress had acted to "correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement—and if he has filled whatever conditions are required to obtain a vested benefit—that he actually receive it." Id. at 375.

As a consequence of the Nachman decision, retroactive liability was attached to an employer despite the exculpatory clause in his pre-ERISA collective bargaining agreement specifically designed to save him from that very source of liability. The decision was reached in a case where the specific application of the statute at issue was ambiguous. Payment to the beneficiaries was held to be required only after the disentanglement of a highly technical set of provisions whose meaning was unclear not only to the lower courts but undoubtedly to many Members of Congress who voted for it.

In the case at hand the equities compelling payment are stronger than in *Nachman*. First, the same Congressional purpose, avoiding great personal tragedy from non-payment of anticipated benefits, is central. It was set forth as follows by the conferees:

The House recedes [and accepts the public pension offset] with an amendment which would provide for an exception for certain people who are already receiving pensions based on noncovered public employment (or who would be eligible for such pension within 5 years of the month of enactment) and who would have expected to receive social security benefits as dependents or survivors under the social security law as in effect on January 1, 1977. The managers are concerned that there may be large numbers of women, especially widows in their late fifties, who are already drawing pensions, or would

be eligible to draw them within 5 years of the date of enactment of this bill, based on their non-covered work and whose retirement income was planned for on the assumption of the availability of full wife's or widow's benefits under social security. Inclusion of this exception to the applicability of the Senate provision, reinforces its prospective nature and avoids penalizing people who are already retired, or close to retirement, from public employment and who cannot be expected to readjust their retirement plans to take account of the "offset" provision that will apply in the future.

Second, there is no doubt about the provisions of the statute. No fancy unraveling of complex provisions is necessary to decipher it, such as was required in *Nachman*. Congress understood what it was doing in enacting the specific provisions.

Third, there is not the same potential for harming the innocent in an affirmative decision. No new retroactive burden will fall upon employers. The cost would be borne entirely by the Social Security trust fund out of taxes already determined.

The only damage would be, if the Court decides in favor of payment under the statute and upholds the severability clause, to what James Kilpatrick, in another context, has called "the holy name of equality." The Congress was more concerned about flesh and blood, in our opinion properly so.

⁶ Conference Committee Report, Social Security Amendments of 1977, H.R. Rep. No. 837, 95th Cong., 1st Sess. 72 reprinted in 1977 U.S. Code Cong. & Ad. News 4155, 4318. S. Rep. No. 612, 95th Cong., 1st Sess. 72.

⁷ Kilpatrick, Insurance Bills; the Woman Pays, Washington Post, May 27, 1983, at A21.

III. This limited scope of the delayed effective duty does not offend the Constitution.

The coverage of the delayed effective date shows that it was not motivated by "overbroad generalizations" such as would have been repugnant to the Due Process Clause of the Fifth Amendment.*

Congress made the delayed effective date available for persons not yet retired who had reason in January 1977 to expect to receive a Social Security spouse benefit without regard to their entitlement to a public pension. This class was defined as those who would have been entitled under the law as it existed in January 1977, pre-Goldfarb, and who became entitled to a public pension during the ensuing five years, ending on December 2, 1982. This class included wives and widows, the only ones who could reasonably have relied on expectations of a Social Security spouse benefit in addition to a public pension. It did not include non-dependent husbands or widowers whose period of entitlement had lasted only the nine months between the Goldfarb decision and enactment of the public pension offset. To have given them a five-year window because they had been eligible for nine months would have been to give them a windfall without rational basis.

That the Congress was intending to help only those who had earlier reason to rely on the promised benefits is further demonstrated by its decision not to delay the effective date of the public pension offset for divorced women who were newly eligible to a spouse benefit under the 1977 amendments. Before 1977 Social Security paid divorcees only if their marriages had lasted for 20 years. After 1977, it recognized divorcees after ten year marriages. But the delayed effective date of the public pension offset was applicable to those women who had

^{*} See Califano v. Goldfarb, 430 U.S. 199 (1977) and Schlesinger v. Bellard, 419 U.S. 498 (1975).

previously been married less than 20 years before divorce. This group had not been relying on a spouse benefit under Social Security, and therefore, had no claim to the delayed effective date. If it were not for the reliance factor, there would be no reason for Congress to have excluded persons divorced after 10 to 20 years from the delayed effective date since the same Congress had reached a concensus to pay them spouse benefits.

The District Court made much of the fact that the Conference Committee Report accompanying the delayed effective date stressed the concern of the "Managers" for the "large numbers of women, especially widows in their late fifties, who are already drawing pensions or would be eligible to draw them within 5 years of the date of enactment of this bill . . . whose retirement income was planned for on the assumption of the availability of full wife's or widow's benefits under Social Security."

Apparently, in the opinion of the District Court, this phrasing shows gender-based discrimination. In our opinion, it shows a concern with the reality of who was relying on the statute as it existed prior to the Social Security Amendments of 1977. Moreover, whatever their expressed concern, the Congress made the delayed effective date applicable to all who could reasonably have relied upon it for any significant period of time, including dependent husbands. The coverage was not restricted to women.

These careful distinctions in coverage are analogous to those upheld by this Court in Schlesinger v. Ballard, 419 U.S. 498 (1975). In that case, the Navy and the Marine Corp provided different standards for selection-out for men and women for whom promotional opportunities differed. In upholding the different gender-based standards, the Court said:

The complete rationality of this legislative classification is underscored by the fact that in corps where male and female lieutenants are similarly situated, Congress has not differentiated between them with respect to time.

419 U.S. at 509.

There is similar rationality in the differentiation between husbands and wives in the delayed effective date.

IV. The delayed effective date established by Congress to protect reliance interests is limited and transitional.

The subsequent history of the delayed effective date and other ameliorations to the public pension offset shows that in enacting the delayed effective date, Congress was concerned to provide a temporary shelter for those individuals who had reason to rely on the pre-Goldfarb law, and no others. Only persons who would have become eligible for a public pension under the rules applicable in January 1977 were protected. After December 1, 1982, they were to be subject to the same rules as everyone else. Despite later amendments, Congress has not changed this principle, demonstrating that the delayed effective date was designed to be a transitional amelioration of a potentially harsh change in the law, not a flouting of the Courts' decision that a permanent differential in the treatment men and women was unconstitutional.

The original scheme provided for those members of the protected class who qualified later, whether wives or dependent husbands, widows or dependent widowers, to be fully covered by the public pension offset. However, when the five years expired in 1982, Congress once again considered future treatment of wives and widows. Despite intensive lobbying on behalf of women in public employment, it decided not to delay further the effective date of the offset. Instead, it decided to retain the dependency provisions which had previously governed the eligibility of husbands and widowers, and make them applicable to wives and widows. Those of either sex who were dependent upon their spouses and became eligible for a public pension in the seven months between December 1,

1982 and July 1, 1983, were given entitlement to Social Security spouse benefits. Non-dependent wives and widows were made subject to the offset to the same extent as non-dependent husbands. Divorcees who had been married 10 or more years were subject to the same standards as spouses.

The solution adopted in Pub. L. No. 97-455 (1983) of protecting dependent spouses but ignoring non-dependent spouses was not fully satisfactory to the Congress, and was not continued. Congress did not say in its Committee reports why it dropped the dependency test, but possible reasons are that it provided all-or-nothing relief, and that it gave full benefits to any person whose income was sufficiently disproportionate to that of his or her spouse, without regard to the adequacy of income. Thus an individual whose income was \$24,999 married to a \$75,000 earner was as fully protected from the offset as one whose earnings were \$1,999 married to a spouse with \$6,000 in annual income.

Worse, there was no minimum protection for persons with very low income. An individual with a public pension entitlement of \$2,000 and a spouse benefit of the same amount who did not meet the dependency test could have half his or her retirement income eliminated.

Congress changed the law once more in the Social Security Amendment of 1983, Pub. L. No. 98-21 (1983), reducing the offset applicable to persons first becoming eligible for a public pension after June 30, 1983 from 100 percent to two-thirds. This means that for every three dollars of public pension to which the individual is entitled based upon his or her own employment, the Social Security spouse benefit will be reduced by two dollars. The entire Social Security benefit will not be eliminated until the individual's public pension is one and a half times the Social Security spouse benefit.

⁹ Section 7 of Pub. L. No. 97-455 (1983).

No distinction is made among the various categories of individuals who are eligible for both Social Security and public pensions. All are subject to the two-thirds offset under the new formula, without regard to sex, dependency, or previous expectations under Social Security.

The delayed effective date serves an important governmental purpose.

Because the delayed effective date was carefully crafted to save the members of a particular cohort from a potentially critical loss of retirement benefits they had reason to rely upon, it is constitutional.

The Court has never said that all gender-based differentials whatever their purpose are improper. (Such a rationale would have been the consequence of the Equal Rights Amendment to the Constitution, which did not pass.) Rather, the Court has upheld Congressional power to make gender-based distinctions "if they serve an important governmental objective and [are] substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). Saving a cohort of older women (and dependent husbands) from a drastic drop in income as a consequence of a change in the Federal law on which they had previously been entitled to rely is such a purpose.

It is true that Congress might have chosen a different formula for protecting those who had relied on the old statute; perhaps it could have found a better formula. That is, however, a legislative question. The test is not whether the Congressional reasoning was ideal, but rather whether it was "patently arbitrary." U.S. Railroad Retierment Board v. Fritz, 449 U.S. 166, 177 (1980). In view of the careful history of Congressional action in enacting the delayed effective date, it cannot be deemed patently arbitrary. "The Constitution requires that Congress treat similarly situated persons similarly, not that

it engage in gestures of superficial equality." Rostker v. Goldberg, 453 U.S. 57, 79 (1981). It permits legislation to provide a differential in the treatment of the two sexes if the differential bears a reasonable relationship to the object of the legislation. Kahn v. Shevin, 416 U.S. 351 (1974).

The fact that the earlier law which was the basis for reliance was later invalidated does not diminish the reasonableness of the reliance on it of those who were covered, or invalidate Congressional efforts to provide a remedy for it. As the Court said in an analogous case involving reliance on a different law it found invalid, "We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it have waived their rights." Chevron Oil v. Huson, 404 U.S. 97, 107 (1971) (quoting Griffin v. Illinois, 351 U.S. 12, 26 (1956)). In the case at hand, the waiver was of the right to seek alternative private employment or to make plans in anticipation of an old age with less income.

Nor does the delayed effective date fall afoul of strictures against "old notions" or "archaic and overbroad generalizations" about the likelihood of women not to be self-supporting, which led to the Goldfarb decision. Rather, this case should be decided favorably to those who would be benefited, in accordance with the principles that underlay Rostker v. Goldberg, 453 U.S. 57 (1981), in which the Court upheld mandatory registration for the draft of males but not females. In that case, the Court found the gender-based differential had been carefully thought through by the Congress. It said that "the Congress did not act 'unthinkingly' or 'reflexively and not for any considered reason." Id. at 72. Its decision "was not the 'accidental byproduct of a traditional way of thinking of females." Id. at 74 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977) and Califano v. Goldfarb, 430 U.S. 199, 223 (1977)).

CONCLUSION

The delayed effective date is Constitutional despite its gender-related coverage. Accordingly, this Court need not reach the severability clause held invalid below.

Respectfully submitted,

EDITH U. FIERST (Counsel of Record) Suite 712 1140 Connecticut Ave., N.W. Washington, D.C. 20036 (202) 223-3420

JOSEPH F. HENDERSON
Staff Counsel
American Federation of
Government Employees,
AFL-CIO
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 737-8700

JAMES R. ROSA
General Counsel
American Federation of
Government Employees,
AFL-CIO
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 737-8700

June 1988

No. 82-1050-ADX Title: Margaret M. Heckler, Secretary of Health and Human Status: GRANTED Services, Appellant

v.

Robert H. Mathews, et al.

Docketed:

December 20, 1982 Court: United States District Court for the Northern District of Alabama

Counsel for appellant: Solicitor General

Counsel for appellee: Bunch, Robert W.

Entry		Dat	•		Not	e Proceedings and Orders
1	Nov	10	15	82		Application for extension of time to docket appeal and order granting same until December 20, 1982 (Powell, November 10, 1982).
2	000	20	10	22		Statement as to jurisdiction filed.
4	Dec					Order extending time to file response to jurisdictional statement until February 20, 1983.
5	Feb	18	19	83		Motion of appellees Robert H. Mathews, et al. to affirm filed.
6	Feb	23	19	83		DISTRIBUTED. March 18, 1983
7	Mar				X	Reply brief of appellants Robert H. Mathews, et al. filed.
8	Mar	21	19	83		PROBABLE JURISDICTION NOTED.
10	May	4	19	83		Order extending time to file brief of appellant on the merits until June 3, 1983.
11	Jun	1	19	83		Order further extending time to file brief of appellant on the merits until June 24, 1983.
12	Jun	16	19	83	. 1	Brief amicus curiae of American Fed. of Government Employees, et al. filed at invitation of Court.
13	Jun	23	19	83		Application for leave to exceed the page limits on appellant's brief on the merits filed with BRW (A-1030).
14	Jun	23	19	83		Order granting same not to exceed 52 pages by White, J.
15	Jun				1	Brief of appellant filed.
17	Jun					Joint appendix filed.
18	Dec	23	19	82		Record filed
20	Jul					Order extending time to file brief of appellee on the merits until August 30, 1983.
21	Aug	26	19	83		Application for leave to file petitioner's brief on the merits in excess of page limits filed with LFP (A-142).
22	Aug	26	19	83		Order granting same not to exceed 55 pages by Powell J.
23	Aug				1	Brief of appellees Robert H. Matthews, et al. filed.
24	Aug					orief amicus curiae of Amer. Civil Lib. Union., et al.
25	Oct	18	19	83		CIRCULATED.
26	Oct					SET FOR ARGUMENT. Monday, December 5, 1983. (2nd case)
27	Nov	22	19	83	X	teply brief of appellant Heckler, Sec. of HSHS filed.
28	Dec				2	ARGUED.